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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 2, 1999 Decided February 11, 2000

No. 99-7017

MARINA MANAGEMENT SERVICES, INC.
AND LISA PETTI ELLIS,
APPELLANTS/CROSS-APPELLEES

v.

VESSEL MY GIRLS, AND
JOHN N. SINGLETON
APPELLEES/CROSS APPELLANTS

Consolidated with
No. 99-7018

Appeals from the United States District Court
for the District of Columbia
(No.97cv00423)

Lisa P. Ellis argued the cause and filed the brief for appellants/cross-appellees.

Thomas J. Whalen argued the cause and was on the briefs for appellees/cross-appellants.

Before: EDWARDS, *Chief Judge,* ROGERS and TATEL, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: In this appeal and cross appeal from the grant of summary judgment to Marina Management Services, Inc., and the dismissal of John N. Singleton's counterclaims, we confront a long-pending dispute arising from efforts to collect money due by Singleton for the lease of a boat slip in the James Creek Marina in the Southwest quadrant of the District of Columbia. Regrettably, various settlement efforts did not succeed, and our review results in a remand of the case to the district court. The district court previously addressed Singleton's contention that the original plaintiff, James Creek Marina, was not the real party in interest under Fed. R. Civ. P. 17(a). *James Creek Marina v. Vessel My Girls,* 964 F. Supp. 20, 21 (D.D.C. 1997). Notwithstanding the filing of an amended complaint with a new plaintiff, Rule 17(a) concerns remain because the record does not indicate that the new plaintiff-"Marina Management Services, Inc., as agent for MIF Realty, LP"-is the real party in interest or authorized to sue on behalf of the real party in interest; hence the district court erred in dismissing Singleton's motion to dismiss the amended complaint under Rule 17(a). In addition, the district court's finding of a bad faith misrepresentation by Marina Management is unsupported by evidence sufficient for imposition of a sanction of a $20,000.00 reduction in the attorneys' fee award. Accordingly, although the district court did not err in finding that Singleton's contract extended beyond June 1996, or abuse its discretion in dismissing Singleton's counterclaims, we affirm in part and reverse in part.

I.

John N. Singleton entered into an Annual Boat Storage License Agreement ("License Agreement") to lease a slip for his boat at the James Creek Marina. The License Agreement, which was signed by Singleton and the manager of the James Creek Marina, was for the period April 1, 1994 to March 31,

1995, and was extended by the parties. Under the License Agreement, Singleton, the Licensee, agreed to make monthly payments of $181.50 for the boat slip, and by the terms of § 19, upon 15 days' delinquency of a monthly installment, he would become, at the Licensor's option, "subject to a day-to-day license at the Transient (Daily) Rate posted in the Marina's offices, with such changes to take effect automatically and without further notice to Licensee." The transient rate charges were substantially higher than the monthly payment.[1] It is undisputed that Singleton became delinquent in paying his slip fees as early as 1995.[2]

On March 3, 1997, the James Creek Marina filed a verified complaint under 46 U.S.C. § 31342(a)[3] for a lien against Singleton's boat and a money judgment of $26,015.67, plus future daily lease charges, marina fees, legal fees, and costs. Exhibit C to the complaint reflected as of February 28, 1997,

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[1] The transient rate is $0.75 per foot per day; because Singleton's boat is 34 feet long, his transient rate was $25.50 per day.

[2] Marina Management received payments from Singleton of $181.50 on April 16, 1994, and $800.00 on August 22, 1995. However, Marina Management asserts that when the latter payment was made, Singleton was already in arrears of $3,989.17 and because his one-year prepayment was put on an invalid MasterCard account, he was "effectively in default from the first day of the [License] Agreement," thus making transient rates applicable as of April 1, 1994.

[3] Section 31342(a) provides, in relevant part:

> (a) . . . a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner -
>
> (1) has a maritime lien on the vessel;
>
> (2) may bring a civil action in rem to enforce the lien; and
>
> (3) is not required to allege or prove in the action that credit was given to the vessel.

46 U.S.C. § 31342(a) (1999).

both past due monthly slip fees and transient rate charges. By *ex* parte order, the district court directed the arrest of Singleton's boat. After a hearing, the court set the bond at $20,542.67 (plus 12% for interest and court costs), "based only upon the unpaid monthly fees and subsequent unpaid transient fees." When the district court became aware that Exhibit C did not reflect the invoices that the marina had actually sent to Singleton before the lawsuit was filed, the court reduced the bond to $6,728.17 (plus 12% for interest and court costs) and reduced the attorneys' fee award under the License Agreement by $20,000.00 as a sanction against Marina Management for having misled the court. In the meantime, Singleton filed five counterclaims, which the district court dismissed as harassing and designed to delay resolution of the litigation.

We address in Part II, the real party in interest claim and the contract issues, in Part III, the sanction for misleading the court, and in Part IV, the dismissal of Singleton's counterclaims.

II.

Following the district court's ruling that the James Creek Marina was not the real party in interest under Fed. R. Civ. P. 17(a)[4] *see James Creek Marina,* 964 F. Supp. at 22, an

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[4] Rule 17(a) provides that:

Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest. Fed. R. Civ. P. 17(a).

amended verified complaint was filed in which the plaintiff was identified as "Marina Management Services, Inc., as agent for MIF Realty, L.P., d/b/a James Creek Marina." Singleton renewed his motion to dismiss the complaint on several grounds. The district court denied the motion by summary order. On cross appeal, Singleton contends that the district court erred in denying his motion and in granting summary judgment to Marina Management on the debt because an agent cannot sue for a disclosed principal, and there is no evidence that MIF Realty, LP had acquired the contract rights between Singleton and the James Creek Marina for any preexisting debt, or that there was an outstanding contract after June 1996.

A.

Rule 17(a) protects a defendant against a subsequent claim for the same debt underlying a previously entered judgment. See, e.g., *United Fed'n of Postal Clerks, AFL-CIO v. Watson,* 409 F.2d 462, 470-71 (D.C. *Cir.* 1969). That understanding was reflected in the district court's opinion addressing Singleton's motion to dismiss the original complaint under Rule 17(a). *See James Creek Marina*, 964 F. Supp. at 22. Although there is a lack of consensus in the case law regarding whether an "agent" authorized to sue based solely on a power of attorney is a real party in interest under Rule 17(a),[5] the operative question is whether the plaintiff "possesses the right to be enforced." *Best v. Kelly,* 39 F.3d 328, 329 (D.C. Cir. 1994) (quoting Charles A. Wright, Law of Federal Courts 490

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[5] *Compare Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 17-18 (2d Cir. 1997); *Airlines Reporting Corp. v. S and N Travel, Inc.*, 857 F. Supp. 1043, 1046-47 (E.D.N.Y. 1994) (Weinstein J.) (citing *Titus v. Wallick*, 306 U.S. 282 (1939)); *Corporation of the President of the Church of Jesus Christ of Latter Day Saint v. Envtl. Protection Comm'n of Hillsborough County*, 837 F. Supp. 413. 415 (M.D. Fla. 1993); *Mitsui & Co. (USA), Inc. v. Puerto Rico Water Resources Auth.*, 528 F. Supp. 768, 776 (D.P.R. 1981).

(1954)); *see also Joyner v. F & B Enterprises, Inc.*, 448 F.2d 1185, 1186 (D.C. Cir. 1971); 6A Wright, Miller, and Kane, Fed. Prac. and Proc. Civ.2d §§ 1545, 1553.

As the caption of the amended complaint and the record appears to show, the stakeholder vis-a-vis Singleton's boat slip debt is MIF Realty, LP.[6] Marina Management purports only to be acting as an agent for MIF Realty, LP, which as principal allegedly "possesses the right to be enforced." *Best,* 39 F.3d at 329. Assuming MIF Realty, LP is the stakeholder for Singleton's debt, there is nothing in the record to show that Marina Management is authorized to prosecute the instant lawsuit. Under the terms of a 1997 operating agreement, MIF Realty, LP authorized Marina Management to enforce license obligations of James Creek Marina tenants and "at the direction of Owner take such actions as may be necessary to effectuate Owner's rights under any such license agreement." The operating agreement further provides that "[o]perator acknowledges that, except as otherwise expressly provided for herein, the initiation and prosecution of lawsuits shall require the prior written consent of Owner . . ." *Id.* ¶ 2.5. The record provides no evidence of written consent by MIF Realty, LP for Marina Management to sue Singleton for his boat slip debts. Neither is there an affidavit from MIF Realty, LP indicating consent or ratification of this lawsuit. *See, e.g., Associated Ins.*

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[6] Exhibit D to Marina Management's opposition to the motion to dismiss states the following: in 1988, the National Park Service, which owns the James Creek Marina, and Marine Management, Inc., entered into a concession agreement that was later assigned to Washington, D.C. Associates ("WDCA"). Following a number of assignments of interest in the concession agreement, and due to the later bankruptcy of WDCA, MIF Realty, LP acquired the concession rights to the James Creek Marina in September 1996. *See infra* n.7. MIF Realty, LP engaged Westrec Marina Management to operate the marina. In February 1997, MIF Realty, LP terminated Westrec and hired Marina Management Services, Inc. to operate the marina.

Mgmt. Corp. v Arkansas Gen. Agency, Inc., 149 F.3d 794, 797 (8th Cir. 1998)(citing Fed R. Civ. P. 17(a)). Nor is there a statement in the judgment of the district court that would protect Singleton against a subsequent claim by MIF Realty, LP for the debt that Marina Management seeks to recover. *Cf. Watson*, 409 F.2d at 470-71.

Accordingly, we reverse the denial of Singleton's motion to dismiss the amended complaint for noncompliance with Rule 17(a), and remand the case to allow Marina Management to supplement the record or file a second amended complaint.

B.

Singleton also contends that the district court erred in granting summary judgment to Marina Management on the debt because there is no evidence that MIF Realty, LP had acquired the contract rights for any preexisting indebtedness for the boat slip and no evidence of an outstanding contract between Singleton and the real party in interest after the License Agreement expired in June 1996. Marina Management, in turn, contends that the district court erred in denying its claim for transient rate charges. Our review of the grant of summary judgment is *de novo*, viewing the record in the light most favorable to the nonmoving party to determine whether there is a genuine issue of material fact as would make summary judgment inappropriate, *See Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1288 (D.C. Cir. 1998) (en banc).

As to the past due slip fees, Singleton maintains that there is no evidence that either Marina Management or MIF Realty, LP was the party to whom he is indebted for the slip fees, or that MIF Realty, LP had acquired the past debts of the James Creek Marina. In his motion to dismiss the amended complaint, Singleton argued that there was no evidence that MIF Realty purchased debts owed Washington, D.C. Associates or that Washington D.C. Associates assigned MIF

Realty, LP the rights in its contracts with Singleton. In opposing the motion, Marina Management submitted Exhibit D purporting to list the owners and managers of James Creek Marina since September 1988.[7] Further, Marina Management recited its efforts to provide Singleton's attorney with direct access to documents and persons who could review the chain of ownership. Singleton, in his response, demanded proof that MIF Realty, LP "has the legal right to any past obligations and current obligations" of Singleton.

The district court made no express finding that MIF Realty, LP had acquired the marina's outstanding debts and there are no documents in the record to substantiate the assertions in Exhibit D. While mere allegations may be sufficient to defeat a motion to dismiss, *see Hanson v. Hoffmann,* 628 F.2d 42, 43 (D.C. Cir. 1980); *see also Maljack Prods., Inc.,* 52 F.3d 373, 375 (D.C. Cir. 1995), summary judgment was inappropriate in the absence of proof that MIF Realty, LP has the right to recover debts incurred by Singleton prior to September 1996 when MIF Realty, LP obtained the concession contract. *See Crawford v. Signet Bank,* 179 F.3d 926, 928 (D.C. Cir. 1999).

Singleton's contention that a second material issue of disputed fact involves whether the License Agreement was extended beyond June 1996 fails, however. In the district

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[7] Exhibit D states the following: Home Savings Association of Kansas City, F.A. ("HSA"), which formerly held an interest in WDCA's concession contract with National Park Service as security for a note it held on WDCA, was taken into receivership by the Resolution Trust Corporation ("RTC"). On April 16, 1993, all of HSA's "rights in the James Creek Marina interest" in the concession contract were assigned by the RTC to MIF Realty, LP. When WDCA filed for bankruptcy in June 1996, MIF Realty filed a Proof of Claim, and "[p]ursuant to a Joint Plan of Reorganization proposed by [WDCA] and MIF Realty, LP, MIF Realty [was] given ownership . . . of *inter alia*, the James Creek Marina interest" in the concession contract on September 2, 1996.

court, Singleton's attorney advised the court that the parties had extended their agreement in June 1996. In granting summary judgment of $7,663.21 for Marina Management, the district court apparently relied on Singleton's attorney's oral representation regarding the continuing viability of the Licensing Agreement after June 1996, using Singleton's statement of February 26, 1997, listing the amount of his debt. Singleton's attorney informed this court at oral argument that he was mistaken in representing to the district court that the parties' agreement had been extended in June 1996. His change of position comes too late: having conceded the fact of extension in the district court, he cannot alter the record now. *See, e.g., United States* ex rel. *Yesudian v. Howard University,* 153 F.3d 731, 748 (D.C. Cir. 1998) (citing *Keller v. United States,* 58 F.3d 1194, 1198 n.8 (7th Cir. 1995)); *United States v. Ins. Co. of North America,* 83 F.3d 1507, 1510 n.6 (D.C. Cir. 1996): *McNamara v. Miller*, 269 F.2d 511. 515 (D.C. Cir. 1959).

Nevertheless, because the record does not reflect a basis on which to conclude that MIF Realty, LP is entitled to recover past-due amounts from Singleton for use of the James Marina Creek boat slip, we are constrained to reverse the grant of summary judgment. In addition, in response to Marina Management's contention that it was entitled to recover transient rate charges, the district court shall consider on remand whether the plain language of the License Agreement entitles recovery for the transient rate charges reflected in Exhibit C. Although the district court ruled that Marina Management had failed to exercise its option under § 19 of the License Agreement because it had not previously billed Singleton at the transient rate, our disposition of the sanction based on Exhibit C to the complaint in Part III warrants that the district court consider anew the claim for transient rate charges based on the plain language of § 19 and the unrefuted evidence that Singleton received oral notice.

III.

At the heart of Marina Management's appeal is its contention that the district court clearly erred in viewing Exhibit C to the complaint-the February 28, 1997, invoice--as a misrepresentation, and thus abused its discretion by imposing a sanction of $20,000.[8] Although our review under an abuse of discretion standard is highly deferential, *see In re Holloway*, 995 F.2d 1080, 1086 (D.C. Cir. 1993); *Founding Church of Scientology of Washington, D.C., Inc. v. Webster*, 802 F.2d 1448, 1457 (D.C. Cir. 1986), if the district court's action is based on a clearly erroneous finding of fact, that action is an abuse of discretion. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990); *F.J. Vollmer Co., Inc. v. Magaw*, 102 F.3d 591, 596 (D.C. Cir. 1996).

The verified complaint stated that under 46 U.S.C. § 31342(a) and the License Agreement, there was a valid maritime lien against Singleton's boat and an in personam contractual claim against Singleton for the unpaid costs of "necessaries," totaling $26,015.67, as of February 28, 1997, plus $25.50 per day for each day thereafter, plus fees, attorneys fees, and costs. Attached to the complaint was Exhibit C, a copy of a February 28, 1997, invoice from the marina for $22,065.67 that was sent to Singleton. The invoice reflected eighteen monthly lump-sum charges for slip fees at the daily transient rate from October 1995 through March 1997. The district court issued an *ex parte* order for the arrest of Singleton's boat on March 5, 1997, and, thereafter, pursuant to

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[8] In light of our disposition of the sanction, we need not address Singleton's contention that Marina Management's counsel, Lisa Petti Ellis, who also appeals the sanction, lacks standing to appeal because the sanction was imposed against the client and not its attorney. Cf. *Ass'n of Am. Physicians and Surgeons v. Clinton*, 187 F.3d 655, 660 n.4 (D.C. Cir, 1999).

Admiralty Rule E(5)(a), determined that the amount of security that Singleton would be required to post in order to regain possession of his boat was $20,542.67.[9]

Singleton moved for reconsideration of the bond amount, arguing that, contrary to the district court's finding, Singleton had not been billed in 1995 and thereafter for transient rate charges, that Exhibit C was prepared for purposes of the litigation, and that his "account history was *altered* to reflect transient rates *never charged* to the defendant." Because the monthly invoices sent to Singleton did not reflect transient fees, Singleton's counsel maintained that Marina Management "clearly intended and did in fact mislead the Court," and, consequently, the bond calculated on the transient fees was not in an amount of Marina Management's claim "'fairly stated'" under Rule E(5)(a). In response to the district court's inquiry whether the inclusion of the transient rate charges shown in Exhibit C represented double billing, Marina Management's attorney advised that there was no double billing because under the Licensing Agreement, transient charges, as reflected in Exhibit C, are over and above the monthly rate. When Singleton's attorney objected that imposition of the transient rate charge was not in the contract and was not a "necessary" but "a big penalty," Marina Management's attorney interjected that the transient rate was in the License Agreement.

Agreeing with Singleton's assertions, the district court reduced the bond to $6,728.17, based largely on a February 26, 1997, statement provided by Singleton showing the outstanding

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[9] The district court initially set the bond amount based on the monthly charge and transient rate charges over and above the monthly fees dating back to September 1995, and other miscellaneous fees. The monthly charge consisted of the $181.50 rate in the Licensing Agreement, which included a $16.50 credit contingent upon Singleton's prepaying the entire amount in advance; because he did not prepay, the monthly charge was $198.

balance through March 1997 to be $5,936.17, and $792.00 in monthly slip fees of $198.00 incurred thereafter. After issuing an order to show cause "as to why sanctions should not be levied against plaintiff and its counsel for having misled the Court," the district court reduced the amount of attorney's fees to be recovered by Marina Management by $20,000. The district court found that:

> The Court was misled by [Exhibit C] into believing that transient fees actually were levied and billed to [Singleton] on the dates listed in . . . [E]xhibit [C]. In addition, this was suggested, if not argued, in papers filed with the Court and during oral argument, and therefore was relied upon by the Court in calculating the amount of security . . .[Marina Management] now admits that transient fees were never charged before the start of this litigation. . . . The Court was misled by the statement [that Marina Management] provided with its Verified Complaint and the arguments presented to it.

On appeal, Marina Management contends that there is no evidence of intentional misrepresentation or violation of Fed. R. Civ. P. ll,[10], or any rule of professional conduct, inasmuch

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[10] Rule 11(b) provides in pertinent part:

> By presenting to the court . . . a pleading . . . or other paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--
>
> . . .
>
> (2) the claims . . . are warranted by existing law. . .;
>
> (3) the allegations and other factual contentions have evidentiary support . . .

Rule 11(c) provides for the imposition of sanctions for violation of subsection (b).

Fed. R. Civ. P. 11 (1999).

as Exhibit C was a good faith interpretation of the parties' agreement. Maintaining that it read the Licensing Agreement to allow retroactive assessment of transient rate charges, and that, even if it erred in its reading, there was abundant evidence of its good faith, Marina Management relies on three facts in particular. First, Singleton was notified by letter terminating his license effective January 31, 1997, that under District of Columbia law he was at a minimum a hold-over tenant and marina could charge the transient rate for continued use and occupancy of the boat slip. Second, the affidavit of the marina dock master, Steve Wiltamuth, stated that Singleton was given "constant verbal and oral notice that transient fees were going to be assessed against him if he failed to pay his marina bill." Third, there was other evidence that the marina had notified Singleton prior to assessing transient fees that it was going to do so, and that it notified Singleton's attorney of previous invoices that did not include transient rate charges. In other words, Marina Management maintains, the language of the Licensing Agreement, specifically § 19, authorized retroactive transient charges; Marina Management had exercised its option to impose such charges, giving Singleton notice beyond that required by § 19 itself; and Singleton's attorney could not reasonably argue that Exhibit C represented anything other than Marina Management's computation of its full claim in admiralty under the parties' agreement.

Rule E for admiralty and maritime claims contemplates *ex parte* proceedings for the arrest of property based on the filing of a complaint. *See* Supp. R. Adm. E(2).[11] Rule E(5)(a)

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[11] Rule E(2)(a) provides

In actions in which this rule is applicable the complaint shall state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading.

provides that unless a bond amount is agreed to by the parties, "the court shall fix the principal sum of the bond or stipulation at an amount sufficient to cover the amount of the plaintiffs claim fairly stated with accrued interest and costs; but the principal sum shall in no event exceed (i) twice the amount of the plaintiffs claim or (ii) the value of the property on due appraisement, whichever is smaller."[12] A person claiming interest in arrested property is entitled to "a prompt hearing at which the plaintiff shall be required to show why the arrest . . . should not be vacated or other relief granted. . . ." Supp. R. Adm. E(4)(f).

The record indicates that the district court's conclusion that it was misled was distinct from its concern about whether there was double charging. Rather, that conclusion reflected the district court's view that it was led to understand that Exhibit C was a summary of the invoices that had actually been sent to Singleton while he had used a boat slip at the James

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[12] Rule E(5)(a) on specific bonds provides that arrested property may be released upon

> the giving of security, to be approved by the court . . . or by stipulation of the parties, conditioned to answer the judgment of the court or of any appellate court . . . In the event of the inability or refusal of the parties so to stipulate the court shall fix the principal sum of bond. . . at an amount sufficient to cover the amount of the plaintiff's claim fairly stated with accrued interests and costs; but the principal sum shall in no event exceed (i) twice the amount of the plaintiff's claim or (ii) the value of the property on due appraisement, whichever is smaller.

Rule E(5)(b) on general bonds provides that the owner:

> may file a general bond or stipulation, with sufficient surety, to be approved by the court, conditioned to answer the judgment of such court in all or any actions that may be brought. . . .

The rule further provides that "the execution of all such process against such vessel shall be stayed so long as the amount secured by such bond . . . is at least double the aggregate amount claimed by plaintiffs in all actions ... in which such vessel has been . . . arrested.

Creek Marina, or as Singleton's attorney asserted, Exhibit C purported to be the marina's "account history" with Singleton. Upon determining that Singleton had not been billed for transient rate charges prior to February 28, 1997 (the date of the Exhibit C invoice), the district court concluded that Exhibit C not only misstated the amount that Singleton owed but was, in effect, intentionally designed to mislead the court. Even assuming no error in the district court's ruling that Marina Management misinterpreted its rights under the License Agreement, it does not necessarily follow that Marina Management acted in bad faith with respect to what Exhibit C represented. *See Lipsig v. Nat'l Student Mktg. Corp.*, 663 F.2d 178, 181 (D.C. Cir. 1980).

Viewed in the context of an admiralty proceeding, it was incumbent on Marina Management under Rule E to state the amount of its claim with particularity, indicating the basis for arriving at that amount, inasmuch as Singleton and the marina could not agree on the amount of the bond to be posted to secure release of his boat. *See* Supp. R. Adm. E(2)(a), *supra* n.11. Our own experience during oral argument suggests that neither counsel may have been particularly helpful in assisting the district court in understanding Exhibit C's limited purpose in support of the claimed lien. Be that as it may, we still do not find evidence of bad faith, much less an intentional misrepresentation, *see United States v. Wallace*, 964 F.2d 1214, 1218 (D.C. Cir. 1992) (citing *Roadway Express Inc. v. Piper*, 447 U.S. 752, 767 (1980)), about what Exhibit C purported to show.

Exhibit C is clearly labeled and dated, and referenced in the complaint solely in connection with Marina Management's statement of its claim under 46 U.S.C. § 31342(a) and the Licensing Agreement. Exhibit A to the complaint referenced Singleton's ownership of the boat using the boat slip at the James Creek Marina, and Exhibit B to the complaint was the

Licensing Agreement dated March 1, 1994. The four page "Statement" in Exhibit C was addressed to Singleton from the marina and listed the charges, payments, and balance due as of each monthly payment date and the end of the month from March 1994 through February 1997.

Marina Management explained in its opposition to Singleton's motion to reconsider the bond amount that although, in the interests of trying to resolve this matter informally it had not previously charged Singleton the transient rate, it had not waived its right to the full amount negotiated in the Licensing Agreement, which provided, in § 19, that such rates may be applied "at the Licensor's option" and "without further notice to Licensee." In Marina Management's view, the transient rates in the License Agreement became part of the maritime lien for "necessaries," citing *Hudson Harbor 79th Street Boat Basin, Inc. v. Sea Casa,* 469 F. Supp. 987, 1979 AMC 2401 (S.D.N.Y. 1979), inasmuch as § 20 of the License Agreement provided that the lien for necessaries shall include "all unpaid charges."

Furthermore, Marina Management's conduct belies an intention to mislead. First, the transcript[13] reveals no affirmative misstatement by Marina Management that Exhibit C was Singleton's account history. The district court was concerned about whether the Exhibit C invoice reflected double charges--the transient rate charge in addition to the monthly fee--for the same services. Marina Management's attorney explained that "if the transient rate is a dollar per foot per day and the monthly

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[13] The only transcript in the record on appeal is for May 22, 1997. where the district court first sought to determine whether the case could be settled. The court, having previously dismissed the case on April 30, 1997, and having learned that settlement efforts were unproductive, then responded to Singleton's request for release of his boat pursuant to Rule E(5)(a) & (b) and to Singleton's motion to dismiss for failure to comply with Rule 17 (a).

fee is $198, then obviously you subtract that [$]198 from whatever the dollar per foot per day is." Thereafter, the district court acknowledged that the amount of the bond is tied to the amount of Marina Management's claim and determined "an appropriate bond . . . [based on] what a 'necessary' is." The record on appeal reflects that Marina Management's attorney was not asked if, and did not volunteer that, Exhibit C was an account history.

Second, the record does not show that Marina Management or its attorney implied that Singleton had been billed for transient rate charges prior to February 1997. The undisputed facts that Marina Management provided Singleton's attorney with copies of the invoices sent to Singleton prior to February 1997 and the commencement of the instant litigation, and that those invoices do not reflect transient rate charges, are inconsistent with an intent to create the impression that such charges had been part of the regular prelitigation billing history.

Third, to the extent that Exhibit C on its face could be mistaken for an account history, the mere appearance of Exhibit C did not amount to an affirmative misrepresentation in view of Marina Management's independent reason for itemizing the amount it claimed was due and owing under Supp. R. Adm. E(2)(a), *supra* n.11. Cf Wallace, 964 F.2d at 1219-20 (quoting RESTATEMENT (SECOND) TORTS § 500 cmt. *g* (1964)). While, as a matter of prudent legal practice, Marina Management might have better clarified precisely what Exhibit C represented, the record does not support a finding of a bad faith misrepresentation by Marina Management or its attorney that Singleton had been presented with invoices for transient rate charges prior to February 28, 1997.

Accordingly, in the absence of a factual basis for the sanction we remand the case so that the district court may enter an order vacating the sanction.[14]

IV.

On cross appeal, Singleton contends that the district court erred in *sua sponte* dismissing his counterclaims as mostly frivolous and designed primarily to harass and delay. Our review is for abuse of discretion, *see Rafferty v. NYNEX Corp.*, 60 F.3d 844, 851 (D.C. Cir. 1995) (citing *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990)), and we find none.

In his amended answer, Singleton counterclaimed for property damage to the vessel and missing property (Counterclaim 1), defamation (Counterclaim II), intentional interference with prospective contractual relations (Counterclaim III), wrongful seizure of the vessel (Counterclaim IV), and abuse of process (Counterclaim V). Singleton sought $200,000.00 in damages, costs, and attorney's fees. The district court observed in dismissing the counterclaims that:

> [b]oth counsel have engaged in name-calling, personal attacks and petty arguments and have burdened the Court with repetitions of arguments already rejected. Defense counsel has filed counterclaims that appear frivolous and designed primarily to harass and delay a final resolution of this case.

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[14] In view of our remand of the case for a determination of who is the proper plaintiff under Rule 17(a) and an order vacating the sanction, we do not address the merits of either Marina Management's contention that the district court erred in denying recovery of certain fees or Singleton's contention that the amount of attorney's fees awarded "was" excessive because a substantial amount pertained to work associated with the sanction issue. These are matters to be resolved on remand.

The district court noted that Singleton had withdrawn the counterclaim for wrongful seizure, and that the counterclaims for defamation and abuse of process were "deficient because of their integral relationship to the legitimate pursuit by plaintiff of this lawsuit." Viewed in the context of the conduct of both counsel, the district court concluded that "all of the counterclaims should be seen as designed primarily to harass," and that "all five counterclaims therefore are properly dismissed under Rule 11 of the Federal Rules of Civil Procedure."

"[T]he central purpose of Rule 11 is to deter baseless filings in district court and thus . . . streamline the administration and procedure of the federal courts." *Cooter & Gell,* 496 U.S. at 393 (quoting Advisory Committee Note on Rule 11, 28 U.S.C. App. p. 576). Dismissal is a legitimate sanction under Rule 11, *see Carman v. Treat*, 7 F.3d 1379, 1382 (8th Cir. 1993); *Rhineheart v. Stauffer*, 638 F.2d 1169, 1171 (9th Cir. 1979), for serious misconduct when lesser sanctions would be ineffective or are unavailable. *See Dodson v. Runyon*, 86 F.3d 37, 39-40 (2d Cir. 1996); *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 948 (9th Cir. 1993). The record supports the district court's finding that the counterclaim for abuse of process was legally deficient because of its close connection with a good faith action for recovery of a debt. *See Scott v. District of Columbia*, 101 F.3d 748, 755 (D.C. Cir. 1996); *Croixland Properties Ltd. Partnership v. Corcoran*, 174 F.3d 213, 215 (D.C. Cir. 1999). So too, the district court could reasonably conclude that Singleton's defamation claim, which included allegations not necessarily integrally linked to the legitimacy of the debt recovery action, nonetheless was "designed primarily to harass" in view of "the petty . . . conduct of counsel for both parties. . . .," as were his counterclaims for property damage and for intentional interference with contractual relations. Marina Management presented multiple affidavits calling into

serious doubt Singleton's property damage claim. Without weighing the merits, this peek at the evidence, *cf, e.g., Massachusetts School of Law at Andover, Inc. v. United States*, 118 F.3d 776, 783 (D.C. Cir. 1997); *Air Line Pilots Ass'n Int'l v. Eastern Air Lines, Inc.*, 869 F.2d 1518, 1521 (D.C. Cir. 1989), confirms that given the contentious history of this unduly prolonged litigation, *see McLaughlin v. Bradlee*, 803 F.2d 1197, 1205-06 (D.C. Cir. 1986), the district court did not abuse its discretion.

Accordingly, we reverse the grant of summary judgment, remanding Marina Management's case to the district court, and affirm the dismissal of the counterclaims.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1999

No. 99-7017

Marina Management Services, Inc. and
Lisa Petti Ellis,
Appellants/Cross-Appellees

v.

Vessel My Girls, and John N. Singleton
Appellees/Cross-Appellants

Consolidated with 99-7018

Appeals from the United States District Court
for the District of Columbia
(No. 97cv00423)

Before: EDWARDS, *Chief Judge*, ROGERS and TATEL, *Circuit Judges*.

JUDGMENT

These causes came to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED**, by the Court, that the judgment of the District Court appealed from in these causes is hereby affirmed in part and reversed in part, in accordance with the opinion for the Court filed herein this date.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner Deputy Clerk
Deputy Clerk

Date: February 11, 2000
Opinion for the court filed by Circuit Judge Rogers.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO: 97-0423 (PELF)

JAMES CREEK MARINA
Plaintiff

v.

VESSEL MY GIRLS,
(a.k.a. MY GIRL II and JENNY LYNN)
Official No: 659523
Her Engines, Masts, Anchors, Cable, etc.,

IN REM

and

JOHN SINGLETON, *IN PERSONAM*
Defendants

March 5, 1997

ORDER FOR ARREST

Upon reviewing the Verified Complaint and supporting papers of James Creek Marina, and it appearing that the conditions for an action *in rem* exist, it is this 5th day of March, 1997,

ORDERED,

(1) that the Clerk of the United States District Court for the District of District of Columbia be authorized and directed to prepare a Warrant for the Arrest of the Vessel MY GIRLS, (a.k.a MY GIRL II and JENNY LYNN), Official No: 659523

and deliver it to the United States Marshal for the District of Columbia; and

(2) that the United States Marshal thereupon arrest the Vessel MY GIRLS, (a.k.a MY GIRL II and JENNY LYNN), Official No: 659523 and provide notice of the commencement of this action to the custodian of the Vessel MY GIRLS (a.k.a MY GIRL II and JENNY LYNN), Official No: 659523 by delivering a copy of the Warrant of Arrest to the custodian; and

(3) that plaintiff, James Creek Marina ("James Creek"), shall proceed to give notice of this suit's commencement to the individual defendant and any lien holders by service of process of the Verified Complaint, Motion for Appointment of Substitute Custodian, Declaration of Substitute Custodian, and proposed Orders of Arrest and Appointment of Substitute Custodian, along with a Notice of Lawsuit and Request for Waiver of Service of Summons or a Summons issued by the Clerk of this Court upon them, in accordance with Rule 4 of the Federal Rules of Civil Procedure.

/s/ Paul L. Friedman
Judge, United States District Court
for the District of Columbia

United States District Court,
District of Columbia
- 964 F.Supp.20 -
May 29, 1997.

JAMES CREEK MARINA, Plaintiff

v.

VESSEL MY GIRLS (a.k.a. My Girl II and Jenny Lynn) ***In Rem*****, and John Singleton In Personam, Defendant.**

Civil Action No. 97-0423 (PELF).

Lisa Petti Ellis, Ellicott City, MD, for plaintiff.

Thomas J. Whalen and Evelyn D. Sahr, Washington DC, for defendants.

MEMORANDUM OPINION AND ORDER

PAUL L. FRIEDMAN, District Judge.

On March 5, 1997, the Court issued an *ex parte* order for arrest of the vessel My Girls, pursuant to Rule C(3) of the Supplemental Rules to the Federal Rules of Civil Procedure for Certain Admiralty and Maritime Claims, on plaintiff's filing of a verified complaint alleging that defendant John Singleton had failed to pay boat storage fees. On April 30, 1997, the parties filed a praecipe stating that a settlement had been reached and that settlement documents were being finalized. The Court therefore entered an Order dismissing the case without prejudice to enable the parties to consummate the settlement. After a thirty-day period, the case would have been dismissed with prejudice if the parties had not moved to reopen.

Prior to the consummation of the settlement, defendant filed a Motion for Relief from the Court's Order of Dismissal and a Motion for Prompt Hearing, alleging that plaintiff was not a legally cognizable entity with the capacity to sue–or to settle. On May 22, 1997, the Court held a status conference and directed the parties to report to Magistrate Judge Alan Kay in order to make one last attempt at settlement. After these settlement discussions failed, the Court convened a hearing later that day to consider: (1) defendant's Motion for Relief; (2) whether the arrest of the vessel should be vacated pursuant to Rule E(4)(f), Supp. R. Adm.; and (3) whether to release the boat upon the posting of a proper bond pursuant to Rule E(5), Supp. R. Adm. At the hearing, the Court stated its intention to grant plaintiff's motion to vacate dismissal and reopen the case.

Upon consideration of the arguments presented by counsel, the exhibits submitted by plaintiff during argument and all of the papers filed in this matter, it is not entirely clear who is the real party in interest for purposes of prosecuting this case. The Application for License is captioned "James Creek Marina." Verified Complaint, Ex. B. The Annual Boat Storage License Agreement and the Addendum to the Agreement seem to identify James Creek Marina as the entity making the agreements. They are headed "James Creek Marina," but the headers of both documents also indicate that James Creek Marina is "operated by Westrec Properties, Inc. for National Park Service" *Id.* The Addendum is signed by the manager of James Creek Marina. *Id.* At the same time, the Licensor identified in the Agreement itself is "Washington D.C. Associates, a California general partnership," located at James Creek Marina. *Id.* The body of the Agreement states that the "Licensor is the Concessioner and operator of James Creek Marina." *Id.* Plaintiff's Exhibit 2, submitted during oral argument, is a receipt apparently issued to John Singleton and headed "James Creek Marina, A Westrec Property." Pl. Ex. 2.

Plaintiff's Exhibit 3, also submitted during argument, is a 1988 concession contract between the United States Department of the Interior, National Park Service and "Marine Management, Inc.–d.b.a. James Creek Marina." Pl. Ex. 3.

From the evidence before it, the Court concludes that James Creek Marina is, at best, a business name, not a corporation or a partnership. At worst, it is merely a physical location operated by as many as three different companies at various times. Rule 17(a) of the Federal Rules of Civil Procedure provides that a real party in interest authorized to prosecute a lawsuit may be "[a]n executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute . . ." There is no evidence that James Creek Marina is any of the persons or entities listed in Rule 17(a), Fed.R.Civ.P., or that it is an individual, a corporation, a partnership or an unincorporated association authorized to sue under federal law or under the laws of the District of Columbia. *See* Rule 17(b), Fed.R.Civ.P.

The Federal Maritime Lien Act provides that only "a person" may establish a maritime lien or bring a civil action to enforce it. *See* 46 U.S.C. § 31342(a). James Creek Marina has failed to demonstrate that it is a "person," whether a natural person or a legal entity such as a corporation or partnership, that is entitled to establish or enforce a maritime lien. Furthermore, Rule 17(b) of the Federal Rules of Civil Procedure makes no provision for suits to be brought solely in a business name. Physical locations also lack the capacity to sue. *See Coeur D'Alene Lake v. Kiebert*, 790 F.Supp. 998, 1006 (D.Idaho 1992) (dismissing object of nature as a plaintiff for lack of capacity). James Creek Marina therefore is not the real party in interest and does not have the capacity to sue under Rule 17, Fed.R.Civ.P. The real parties in interest that may

have the capacity to sue in this case may be one or more of the following: Marine Management, Inc., a Washington, D.C. corporation; Washington D.C. Associates, a California general partnership; and Westrec Properties, Inc., a corporation.

Because plaintiff is not a legal entity and lacks the capacity to sue, defendant has asked the Court to dismiss this case and release defendant's vessel. Such an uncompromising result is not authorized by Rule 17(a) of the Federal Rules, however, which expressly provides: "No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. . . ." Rule 17(a), Fed.R.Civ.P. *See also Link Aviation, Inc. v. Downs*, 325 F.2d 613, 614 (D.C.Cir.1963). The Court therefore will give plaintiff 20 days to amend its complaint by joining or substituting the entity or entities that ultimately are the real parties in interest in this case with the capacity to sue.

With respect to the propriety of the arrest of defendant's boat, plaintiff has demonstrated to the satisfaction of the Court that the arrest of the vessel was indeed proper and should not be vacated. The Federal Maritime Lien Act, 46 U.S.C. § 31342(a), provides that "a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner–(1) has a maritime lien on the vessel; [and] (2) may bring a civil action in rem to enforce the lien. . ." A maritime lien can be enforced through an in rem action and by a court's issuance of an arrest warrant. *See* Rules C(1), C(3), Supp. R. Adm. Exhibit C. to plaintiff's verified complaint is a statement for monthly slip fees and other charges, and the defendant does not dispute the fact that he indeed owes payment for certain "necessaries" provided for his boat under the Annual Boat Storage License Agreement described above. The Court

therefore finds that the arrest of the boat in this case was proper and should not be vacated.

Despite a proper arrest of the vessel, defendant seeks release of his boat and offers to post security pursuant to Rule E(5)(a), Supp. R. Adm., which provides:

> [W]henever . . . process in rein is issued the execution of such process shall be stayed, or the property released on the giving of security, to be approved by the court or clerk, or by stipulation of the parties conditioned to answer the judgment of the court or any appellate court. . . In the event of the inability or refusal of the parties so to stipulate the court shall fix the principal sum of the bond or stipulation at an amount sufficient to cover the amount of the plaintiff's claim fairly stated with accrued interest and costs; but the principal sum shall in no event exceed (i) twice the amount of plaintiff's claim or (ii) the value of the property on due appraisement, whichever is smaller. . .[1]

Defendant maintains that the amount of the security required should be limited to the amount actually owed for the "necessaries" that were provided to defendant's boat, i.e., the overdue dock fees and other fees related to the storage of his boat. Plaintiff argues that the term "necessaries" also includes the attorneys' fees that plaintiff incurs in enforcing its maritime lien. Plaintiff bases this argument on the fact that the Annual Boat Storage License Agreement signed by defendant provides that "[a]11 expenses, including attorneys' fees and costs, incurred by Licensor in connection with the enforcement of its

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[1] Plaintiff argues that Rule E(5)(b) applies, requiring a bond in "at least double the aggregate amount claimed by plaintiffs." The Court disagrees. Rule E(5)(a) is the relevant provision, and it requires a bond only sufficient to cover plaintiff's claim, "fairly stated," with accrued interest and costs, and totaling not more than twice the amount of the claim.

rights under this Agreement, including right to liens, maritime and otherwise, and fees and costs incurred in any lien action, shall be paid by Licensee. . . ."

Verified Complaint, Ex. B.

Contrary to plaintiff's argument, "necessaries" are only "repairs, supplies, towage, and use of a dry dock or marine railway." 46 U.S.C. § 31301(4). Necessaries do not include attorneys' fees. *Bradford Marine, Inc. v. M/V Sea Falcon*, 64 F.3d 585, 587 (11th Cir.1995). The amount of the bond that defendant must post to obtain the release of his boat therefore must be based only on the amount of plaintiff's claim, "fairly stated," for the overdue boat storage fees and other storage-related costs.

Apparently a slip rental fee of $198.00 (minus a $16.50 promotional credit) together with a dock box fee of $10.00 was charged to defendant on a monthly basis. Verified Complaint, Ex. C. Defendant has alleged failed to make payments since August 1995. Verified Complaint at ¶ 6. In October 1995, James Creek Marina began charging defendant the higher "transient rate" to store his boat. Verified Complaint, Ex. C. [2] It appears to the Court that in addition to charging the transient rate, James Creek Marina also continued to charge defendant the monthly rate of $198.00. *See id.* The Court will not calculate security based on what appears to be "double billing" on the part of James Creek Marina. The Court will set the amount of security based only upon the unpaid monthly fees and subsequent unpaid transient fees.

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[2] The License Agreement provides that if the licensee fails to pay storage fees within fifteen days after the due date, the rate charged will "become a day-to-day license at the Transient (Daily) Rate posted in the Marina's offices, with such changes to take effect automatically and without further notice to Licensee." Verified Complaint, Ex. B.

According to the Court's calculation, defendant's allegedly unpaid monthly and transient fees total twenty thousand five hundred forty-two dollars and sixty-seven cents ($20,542.67). The defendant is entitled to release of the vessel on the posting of security in that amount plus twelve percent for interest and court costs. *See* Rule E(5)(c), Supp. R. Adm. Defendant may post a 10 percent surety bond. Accordingly, it is hereby

ORDERED that plaintiff's Motion to Vacate Dismissal and Reschedule Status Conference is GRANTED nunc pro tunc as of May 19, 1997; it is FURTHER ORDERED that the case is reopened and restored to the docket; it is

FURTHER ORDERED that Defendant's Motion for Relief is GRANTED in part and DENIED in part; it is

FURTHER ORDERED that Plaintiff has until June 20, 1997 to amend its complaint and name the proper party or parties in interest having the capacity to sue; and it is

FURTHER ORDERED that bond is set at twenty thousand five hundred forty-two dollars and sixty-seven cents ($20,542.67) plus twelve percent for interest and court costs. Defendant may post a 10 percent surety bond. Upon proof that such a bond has been posted, the vessel My Girls will be released.

This Court strongly recommends that the parties to this suit and any other interested parties continue settlement discussions and attempt to resolve this dispute without further court involvement. Magistrate Judge Kay will make himself available, upon request, to facilitate such discussions.

SO ORDERED.

/s/ Paul L. Friedman
Judge, United States District Court
for the District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO: 97-0423 (PELF)

JAMES CREEK MARINA
Plaintiff

v.

VESSEL MY GIRLS,
(a.k.a. MY GIRL II and JENNY LYNN)

IN REM

and

JOHN SINGLETON, *IN PERSONAM*
Defendants,

July 7, 1997

MEMORANDUM OPINION AND ORDER

On May 29, 1997, this Court issued a Memorandum Opinion and Order in this case permitting plaintiff to amend its complaint to include the real party in interest with the capacity to sue and permitting defendant John Singleton to secure the release of his vessel upon the posting of a bond. Plaintiff was given until June 20, 1997 to amend the complaint.[1]

Based on plaintiff's representations as to the unpaid balance on a slip rental, the bond was set at twenty thousand five hundred forty-two dollars and sixty-seven cents

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[1] An amended complaint has now been filed, and defendants have moved to dismiss it. Plaintiff's opposition is not yet due.

($20,542.67) plus 12 percent for interest and court costs. The Court calculated the unpaid balance to include monthly rates of one hundred ninety-eight dollars ($198.00) for the months from the start of the contract until October 1995, transient rates of twenty-five dollars and fifty cents ($25.50) per day since October 1995, and other miscellaneous charges and deductions.

Defendants now move for reconsideration of the Court's Order, requesting that the bond be lowered to no more than six thousand dollars ($6,000.00). Defendants submit invoices provided to them for the slip rental. Defendants' invoices indicate that the amount due as of February 26, 1997, was five thousand nine hundred thirty-six dollars and seventeen cents ($5,936.17). Def.s' Motion for Reconsideration, Ex. A. On none of the invoices submitted are transient fees assessed. Defendants therefore argue that plaintiff did not elect to charge transient fees as permitted, although not required, by the Annual Boat Storage License Agreement.[2] Defendants further allege that plaintiff's levy of the transient rate in the context of this litigation was a wrongful backdating of charges intended to harass defendants and mislead the Court.

In its response to defendants' motion and its own motion for reconsideration, plaintiff states that the actual amount of money owed is thirty thousand two hundred eighteen dollars and sixty-one cents ($30,218.61) and requests that bond be set at sixty thousand dollars ($60,000). To arrive at this figure, plaintiff asserts that defendants failed to make the first rental payment; thus, it maintains, defendants owe transient fees from the start of the Agreement. Plaintiff's figure also includes attorneys' fees, despite the Court's prior ruling that attorneys'

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[2] The Agreement reads: "If Licensee fails to pay an installment of license fees due hereunder within 15 days after it is due, the license granted hereby shall, *at the Licensor's option*, become a day-to-day license at the Transient (Daily) Rate . . . . ." Verified Complaint, Ex. B (emphasis added).

fees would not be included as a basis for any security set by the Court. *See* May 29, 1997 Memorandum Opinion at 6.[3] Plaintiff also asks the Court to consider that defendants were never charged for electricity during the time that the vessel was docked at James Creek Marina and to add that figure to plaintiff's claim. Plaintiff has never submitted any documentation to this Court, however, that would establish or even approximate the charges for electricity.

Plaintiff's original Verified Complaint includes an exhibit identified as a statement of money owed by defendant John Singleton as of February 28, 1997. The total on this statement is twenty-two thousand sixty-five dollars and sixty-seven cents ($22,065.67). It is quite clear from the statement that defendants submitted with their motion, however, that defendants were only billed slip fees and not transient fees. Exhibit A to defendants' motion is a statement, provided to defendants by plaintiff, that indicates that the balance owed as of February 26, 1997 (including slip fees for March 1997) was five thousand nine hundred thirty-six dollars and seventeen cents ($5,936.17), *not* twenty-two thousand sixty-five dollars and sixty-seven cents ($22,065.67). The Court was misled by the document attached to plaintiff's Verified Complaint into believing that transient fees actually were levied and billed to defendants on the dates listed in plaintiff's exhibit. In addition, this was suggested, if not argued, in papers filed with the Court

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[3] Although plaintiff asserts a claim to attorneys' fees as "necessaries" under the contract, this Court is unwilling to expand the statutory language which clearly does not include attorneys' fees as "necessaries." 46 U.S.C. § 31301(4); *see also Bradford Marine, Inc. v. M/V Sea Falcon*, 64 F.3d 585, 587 (11th Cir. 1995). Plaintiff's protestations to the contrary, attorneys' fees accumulated in the enforcement of a maritime lien are not services to a vessel. Attorneys' fees and other legal fees have been included as necessaries in preferred ship mortgage cases, but such cases are governed by different law.

and during oral argument, and therefore was relied upon by the Court in calculating the amount of security in the Court's May 29, 1997 Opinion. Unlike defendants, plaintiff has never provided the Court with individual monthly receipts or the February 26, 1997 statement it sent to defendants.

Plaintiff now admits that transient fees were never charged before the start of this litigation: "Defendant is absolutely correct in his assertion that Plaintiff did not resort to charging Defendant any transient rate prior to instituting this litigation, although it clearly could have." Pl.'s Opp'n to Def.s' Motion at 4. The Court was misled by the statement plaintiff provided with its Verified Complaint and the arguments presented to it. In light of the invoices provided by defendants and the arguments made by plaintiff, which seem to indicate that plaintiff did indeed backdate the transient fees, or attempt to do so for the purposes of this litigation, this Court calculates defendants' unpaid slip fees to total six thousand seven hundred and twenty-eight dollars and seventeen cents ($6,728.17).[4] Defendants are entitled to release of the vessel on the posting of security in that amount plus twelve percent for interest and court costs. *See* Rule 5(E)(c), Supp. R. to Fed. R. Civ. P. for Certain Admiralty and Maritime Claims. Defendants may post a surety bond. For the foregoing reasons, it is hereby

ORDERED that defendants' Motion for Reconsideration is GRANTED in part and DENIED in part; it is

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[4] This figure is calculated based on the statement dated February 26, 1997, provided by defendant, that indicates that the outstanding balance, up to and including March 1997, was five thousand nine hundred thirty-six dollars and seventeen cents ($5,936.17) and on monthly slip fees of one hundred ninety-eight dollars ($198.00) since April 1, 1997 (totaling seven hundred ninety-two dollar ($792.00)). This Court declines to speculate as to the value of the electricity that plaintiff allegedly provided to the vessel.

FURTHER ORDERED that plaintiff's Motion for Reconsideration is DENIED; it is

FURTHER ORDERED that bond is set at six thousand seven hundred twenty-eight dollars and seventeen cents ($6,728.17) plus twelve percent for interest and court costs. Defendants may post a surety bond. Upon proof that such a bond has been posted, the vessel My Girls will be released; and it is

FURTHER ORDERED that plaintiffs' counsel shall show cause in writing under oath within fifteen (15) days from the date of this Order as to why sanctions should not be levied against plaintiff and its counsel for having misled the Court.

SO ORDERED.

/s/ Paul L. Friedman
PAUL L. FRIEDMAN
United States District Judge

Date: 7/7/91

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO: 97-0423 (PLF)

JAMES CREEK MARINA
Plaintiff,

v.

VESSEL MY GIRLS,
(a.k.a. MY GIRL II and JENNY LYNN)

IN REM

and

JOHN SINGLETON, IN PERSONAM
Defendants.

July 10. 1997

ORDER

Having deposited seven thousand five hundred thirty-five dollars and fifty-five cents ($7, 535.55) into the Registry of the Court, and this amount representing six thousand seven hundred twenty-eight dollars and seventeen cents ($6,728.17) plus twelve percent for interest and court costs, defendant has posted the amount of security ordered by the Court in its Order of July 7, 1997. Accordingly, it is hereby

ORDERED that the vessel My Girls be RELEASED.

SO ORDERED.

/s/ Norma Holloway Johnson
for Paul L. Friedman
United States District Judge

DATE: *July 10, 1997*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO: 97-0423 (PLF)

MARINA MANAGEMENT SERV., INC
JAMES CREEK MARINA
Plaintiff,

v.

VESSEL MY GIRLS,
(a.k.a. MY GIRL II and JENNY LYNN)
Official No: 659523
Her Engines, etc.,

IN REM

and

JOHN SINGLETON, IN PERSONAM
Defendants.

July 25. 1997

ORDER DISMISSING
SECOND MOTION TO DISMISS

Having considered the Defendant's Second Motion To Dismiss, the opposition thereto and the reply it is this *25th*, day of *July*, 1997 hereby ORDERED THAT:

(1) The Second Motion To Dismiss is hereby DENIED; and

(2) That the Plaintiff not be awarded costs associated with having to defend at this time said Motion. It is time to settle this case or move to a resolution on the merits.

/s/ Paul L. Friedman
Judge, United States District Court
for the District of Columbia

July 25, 1997

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO: 97-0423 (PLF)

MARINA MANAGEMENT SERVICES., INC
As Agent for MIF REALTY, LP (d/b/a)
JAMES CREEK MARINA
Plaintiff

v.

VESSEL MY GIRLS,
(a.k.a. MY GIRL II and JENNY LYNN) *IN REM*
Defendant,

and

JOHN SINGLETON, IN PERSONAM
Defendant, Claimant.

JOHN SINGLETON,
Counter-plaintiff

v.

MARINA MANAGEMENT SERVICES., INC
As Agent for MIF REALTY, LP (d/b/a)
JAMES CREEK MARINA
Counter-Defendant

February 9, 1998

ORDER

On July 7, 1997, the Court directed plaintiff counsel to show cause in writing under oath why sanctions should not be levied against plaintiff and its counsel for having misled the

Court. The filings of counsel for both parties in connection with that order contain scurrilous personal attacks, name-calling and petty arguments which demean the legal profession. The lack of civility and *ad hominem* attacks by counsel on both sides of this case is breathtaking. In addition, defendants' counterclaims, which threaten to delay the immediate resolution of a case involving admittedly unpaid boat dock fees, appear to be mostly frivolous and designed primarily to harass. See Rule 11, Fed. R. Civ.P.

The Court is troubled by the way in which counsel have decided to conduct themselves and, in particular, the way in which they have entrenched themselves in a mire of seemingly petty arguments that waste the Court's time and resources. The Court therefore highly encourages counsel to consider the option of resolving their rancorous differences instead of using the Court's time to decide the outstanding issues in this case – a decision that would require a hearing at which counsel for both sides would be represented by separate counsel, as the Court would put both lawyers under oath to develop the true facts concerning who said what to whom, the accuracy and legitimacy of the documents submitted in this case and the accuracy of oral and written representations made to the Court, a spectacle that might well result in the court levying sanctions personally against counsel as well against their clients.

In order to avoid spending even more time on the issues about which counsel have chosen to bicker, it is hereby.

ORDERED that unless the parties can resolve all outstanding matters in this case by withdrawing all request for sanctions, withdrawing the offending pleadings, presenting a joint request that the Court discharge its Order to show cause, and withdrawing defendants' counterclaims by March 13, 1998, the Court will appoint a special master, with the parties to pay the costs of such appointment. The special master will attempt

to bring this case to resolution and, if necessary, take testimony, find facts and prepare a report recommending appropriate sanctions to be levied and whether either counsel should be referred to this Court's Grievance Committee.

SO ORDERED.

/s/ Paul L. Friedman
PAUL L. FRIEDMAN
United States District Judge

DATE: 2/9/98

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO: 97-0423 (PLF)

MARINA MANAGEMENT SERVICES., INC
As Agent for MIF REALTY, LP (d/b/a)
JAMES CREEK MARINA
Plaintiff

v.

VESSEL MY GIRLS,
(a.k.a. MY GIRL II and JENNY LYNN) *IN REM*

Defendant,

and

JOHN SINGLETON, IN PERSONAM
Defendant, Claimant.

JOHN SINGLETON,
Counter-plaintiff

v.

MARINA MANAGEMENT SERVICES., INC
As Agent for MIF REALTY, LP (d/b/a)
JAMES CREEK MARINA
Counter-Defendant

February 9, 1998

MEMORANDUM OPINION AND ORDER

Pending before the Court are plaintiff's motion for summary judgment, defendants' response and plaintiff's reply. After considering the papers regarding this particular aspect of the

case and the other copious and vexatious filings counsel have submitted throughout the life of this action, the Court is prepared to grant plaintiff's motion for summary judgment, but seeks additional information from the parties before entering judgment.

This case started with the seizure of defendant John Singleton's boat, "My Girls," because, as Mr. Singleton admits, he did not pay fees to dock his boat for a year and several months. *James Creek Marina v. Vessel My Girls*, 964 F. Supp. 20, 21-23 (D.D.C 1997).[1] Plaintiff seeks billed dockage or slip fees, transient fees (a higher, day-to-day penalty rate), U.S. Marshal's and related fees (for the arrest, seizure and care of the boat while under arrest), pre-judgment and post-judgment interest and attorneys' fees and other costs related to pursuing this litigation.

The Court has already ruled that even though plaintiff had a contractual option to charge Mr. Singleton higher transient fees, it failed to exercise that option. Mr. Singleton was never actually billed transient fees but only slip fees; indeed, the first time the issue of transient fees arose was within the initiation of this litigation. *See* Memorandum Opinion and Order of July 7, 1997 at 2-4. Plaintiff cannot retroactively bill Mr. Singleton and therefore is not entitled to transient fees.

With respect to the dockage or slip fees, however, there is no genuine dispute that Mr. Singleton owes those fees as well as the U.S. Marshal's and related fees respecting the seizure of the vessel. *See James Creek Marina v. Vessel My Girls*, 964 F. Supp at 23; Testimony of John Singleton at Hearing on May

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[1] The seizure, or arrest, of Mr. Singleton's boat was executed pursuant to the Federal Maritime Lien Act, 46 U.S.C.§ 31e42(a) and Rules (C)(1), C(3), Supp. R. Adm. & Maritime Claims. This Court has already held that the arrest of Mr. Singleton's boat was proper. *James Creek Marina v. Vessel My Girls*, 964 F. Supp. at 22-23.

22, 1997; Plaintiff's Reply to Defendant's Opposition to Plaintiff's Motion for Summary Judgment at 6-8. Nor can there be any dispute that plaintiff is entitled to both pre-judgment and post-judgment interest with respect to these damages at the rate set by 28 U.S.C. § 1961. *See Reeled Tubing, Inc. v. M/V Chad G.*, 794 F.2d 1026 (5th Cir. 1986). Accordingly, the Court is prepared to enter judgment for plaintiff with respect to these amounts.

With respect to attorneys' fees, the Court has ruled that attorneys' fees are not "necessaries" under the Federal Maritime Lien Act, 46 U.S.C. § 31301(4). *James Creek Marina v. Vessel My Girls*, 964 F. Supp. at 23; Memorandum Opinion and Order of July 7, 1997 at 3 n.3; *see Bradford Marine, Inc. v. M/V C Falcon*, 64 F.3d 585, 587 (11th Cir. 1995). Plaintiff does not seek fees under the statute, however, but under the express language of the Annual Boat Storage License Agreement signed by defendant John Singleton. This agreement provides that the licensee must pay attorneys' fees and costs incurred by the licensor in connection with the enforcement of its rights under the agreement.[2] While the Court will not award damages for attorneys' fees to plaintiff's counsel that includes time spent in responding to this Court's Order to show cause why sanctions should not be levied against plaintiff and its counsel, the Court is prepared to enter judgment for plaintiff that will include attorneys' fees and costs incurred by plaintiff in connection with the enforcement of its rights under the Boat Storage License Agreement. *See Ideal Electronic Security Co. v. International Fidelity Ins. Co.*, 129 F.3d 143, 148 (D.C. Cir. 1997).

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[2] The Court may potentially find an additional basis for awarding attorneys' fees in this case pursuant to the general rule that "the award of fees and expenses in admiralty actions is discretionary with the district judge upon a finding of bad faith." *Ingersoll Milling Machine v. M/V Bodena*, 829 F.2d 293, 309-10 (2d Cir. 1987).

For the foregoing reasons, it is hereby

ORDERED that defendants may file a memorandum not to exceed ten pages in length on or before February 23, 1998, providing legal argument and authority as to why plaintiff is not entitled to attorneys' fees and costs (1) under the Boat Storage License Agreement, or (2) under general rules of admiralty law, and/or (3) because certain of the fees and costs sought are not reasonable; it is

FURTHER ORDERED that plaintiff may respond with a ten-page memorandum by March 6, 1998; and it is

FURTHER ORDERED that plaintiff shall submit by March 6, 1998 two alternative proposed forms of judgment that will effectuate the rulings of the Court set forth in this Opinion, one to reflect the inclusion of attorneys' fees and one to exclude attorneys' fees.[3] In the alterative orders, plaintiff shall state specifically the rate of interest used in calculating pre-judgment and post-judgment interest amounts. The pre-judgment interest shall be in accordance with the relevant provisions of 28 U.S.C. § 1961.

SO ORDERED.

/s/ Paul L. Friedman
PAUL L. FRIEDMAN
United States District Judge

Date: 2/9/98

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[3] The Court does not believe that the Fifth Circuit's opinion in *Reeled Tubing, Inc. v M/V Chad G*, 794 F.2d 1026 (5th Cir. 1986), supports the award of pre-judgment interest for any portion of the damages awarded with respect to attorneys' fees.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO: 97-0423 (PLF)

MARINA MANAGEMENT SERVICES., INC
As Agent for MIF REALTY, LP (d/b/a)
JAMES CREEK MARINA
Plaintiff

v.

VESSEL MY GIRLS,
(a.k.a. MY GIRL II and JENNY LYNN) ***IN REM***
Defendant,

and

JOHN SINGLETON, IN PERSONAM
Defendant, Claimant.

JOHN SINGLETON,
Counter-plaintiff

v.

MARINA MANAGEMENT SERVICES., INC
As Agent for MIF REALTY, LP (d/b/a)
JAMES CREEK MARINA
Counter-Defendant

January 5, 1999

MEMORANDUM OPINION

This matter is before the Court on plaintiff's unopposed request for ruling respecting its entitlement to attorneys' fees. In addition, the Court has yet to enter final judgment for

plaintiff, as it previously indicated it would, on plaintiff's motion for summary judgment. It must also consider whether counsel for either party should be sanctioned for his or her personal attacks, name-calling and petty arguments as well as (in the case of plaintiff's counsel) misleading statements, documents and arguments and (in the case of defendants' counsel) the frivolous filing of counterclaims.

Upon consideration of plaintiff's motion for summary judgment, the Court found in its Memorandum Opinion of February 9, 1998 that there was no factual dispute that defendant John Singleton owed plaintiff dockage or slip fees — but *not* transient fees — as well as the U.S. Marshal's and related fees respecting the seizure of the vessel, and both pre-judgment and post-judgment interest at the rate set by 28 U.S.C. § 1961. *See* Memorandum Opinion and Order of February 9, 1998 at 2-3. It indicated that it was prepared to enter judgment for plaintiff that would also include attorneys' fees and the costs incurred by plaintiff in connection with the enforcement of its rights under the Boat Storage License Agreement. *Id.* at 3. It requested additional filings from the parties respecting plaintiff's right to attorneys' fees and the amount of any such fees. Counsel provided supplemental filings, as requested.

Upon consideration of all the papers filed by the parties with respect to plaintiff"s motion for summary judgment and the Court's request for information regarding attorneys' fees, the Court concludes that it will enter judgment for plaintiff in the amount of $7, 663.21, which represents the Court's calculation of the slip fees pursuant to its July 7, 1997 and February 9, 1998 Memorandum Opinions and Orders ($6,728.17), plus the U.S. Marshal's fees ($390.00), plaintiff's filing fee ($150.00) and prejudgment interest at the rate of 5.391% per annum ($395.04). The Court will also award plaintiff's counsel $10,000.00 in attorneys' fees, which represents approximately

one-third the amount of attorneys' fees the Court concludes plaintiff is reasonably entitled to for the work performed.

The Boat Storage License Agreement signed by defendant expressly provides;

> All expenses, including attorneys' fees and costs, incurred by Licensor in connection with the enforcement of its rights under this Agreement, including right to liens, maritime and otherwise, and fees and costs incurred in any lien action, shall be paid by Licensee. . . .

Verified Complaint, Ex. B. This provision, like any other contract provision, is enforceable, but, under established principles, plaintiff is only entitled to attorneys' fees reflecting the extent of its success on the merits. *See Fleming v. Carroll Publishing Co.*, 581 A.2d 1219, 1228 (D.C. 1990). Plaintiff has *not* been wholly successful in its pursuit of this litigation. Plaintiff repeatedly has failed to convince this Court that is should be awarded certain "transient fees" that it never actually billed defendant. In addition, too much of the Court's time and resources have been spent not on the merits of plaintiff's claims, but on a collateral issue created when plaintiff's counsel filed a misleading exhibit and made certain misleading arguments to the Court. Plaintiff has, however, succeeded on the central claim in its case – that it is entitled to slip fees under the Boat Storage License Agreement.[1]

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[1] Defendant John Singleton continues to argue that plaintiff Marina Management has not established by legally competent evidence that it is an entity entitled to sue for the slip fees, that is, that it is not the real party in interest with capacity to sue. The Court has already dealt with this argument and has found defendants' arguments with respect to plaintiff's capacity to sue wanting. *See* Memorandum Order of July 25, 1997 and Memorandum Opinion and Order of May 29, 1997 at 4. It will not revisit the issue again.

Plaintiff has requested $35,461.75 in attorneys' fees. This request already takes into account the Court's decision that it will not award plaintiff any fees that relate to the Court's July 7, 1997 Order to show cause why sanctions should not be levied against plaintiff and its counsel for having misled the Court. The Court finds it appropriate, however, to reduce this fee amount even further to exclude the time plaintiff's counsel spent preparing its August 7, 1997 motion for reconsideration — a wholly unnecessary motion reiterating arguments regarding transient fees that the Court had already considered and rejected — and the amounts billed with respect to the Court's February 9, 1998 Order regarding the uncivil and possibly sanctionable conduct of counsel for both sides and the possible need for appointment of a special master.[2] The total deductions from plaintiff's request for attorneys' fees therefore is $4,617.14. The resulting figure is $30,844.61.

The Court has decided to cut this figure further, to approximately one-third of the apparently reasonable amount request, or $10,000, finding the payment of approximately $20,000 an appropriate sanction for the conduct of plaintiff's counsel in misleading the Court (1) by filing an exhibit

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[2] The deductions are as follows:

-$ 425.00	(Bill dated 07/21/97)
- 678.13	(Bill dated 08/04/97)
-1,356.25	(Bill dated 08/05/97)
- 678.13	(Bill dated 08/06/97)
-$3,137.51 —	Total Deduction for Plaintiff's Motion for Reconsideration
-$ 451.50	(Bill dated 02/16/98)
- 196.88	(Bill dated 02/19/98)
- 481.25	(Bill dated 04/06/98)
- 350.00	(Bill dated 04/11/98)
-$1,479.63 —	Total Deduction for Work Regarding Sanctionable Conduct

intended to persuade the Court that transient fees were actually levied and billed to defendants on the dates listed in plaintiff's exhibit, when in fact she knew they were not, and (2) in relying on this misleading exhibit in papers filed with the Court and during oral argument. Memorandum Opinion and Order of July 7, 1997, at 3-4. *See In re TCL Ltd.*, 769 F.2d 441, 445 (7th Cir. 1985) ("Even those who prevail may be liable for fees if in bad faith they cause their adversaries to bear excessive costs")' *Dehner v. Kansas City Southern Industries*, 713 F. Supp. 1397, 1403 (D. Kan. 1989) ("[I]nstead of finding a Rule 11 violation, this court will refuse to assess attorney's fees in favor of plaintiffs as a part of their damages"); *cf. MacArthur Area Citizenas Ass'n v. Republic of Peru*, 809 F.2d 918, 923-24 (D.C. Cir. 1987) *order modified by* 823 F.2d 606 (D.C. Cir. 1987) (court has inherent power to impose sanctions for cost of an improperly filed appellate brief). Counsel should consider herself fortunate that a more severe sanction is not being imposed for this conduct.[3]

Both counsel have engaged in name-calling, personal attacks and petty arguments and have burdened the Court with repetitions of arguments already rejected. Defense counsel has filed counterclaims that appear frivolous and designed primarily to harass and delay a final resolution of this case. For the reasons discussed in its Order of February 9, 1998, these

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[3] It is a violation of the District of Columbia Rules of Professional Conduct for a lawyer to knowingly make a false statement of material fact or to offer evidence that the lawyer knows to be false. DISTRICT OF COLUMBIA RULES OF PROFESSIONAL CONDUCT Rule 3.3. (amended 1996). Violations of these Rules are grounds for discipline in this Court. *See* RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, Rule 706(a) (1994).

counterclaims therefore will be dismissed. *See* Rule 11(b)(1), Fed. R. Civ. P.[4]

Orders consistent with this Memorandum Opinion will be entered this same date .

SO ORDERED.

/s/ Paul L. Friedman
PAUL L. FRIEDMAN
United States District Judge

FILED January 6, 1999

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[4] Defendant has announced its consent to dismissal of the fourth of the five counterclaims (for wrongful seizure of the vessel). *See* Defendant's Memorandum of Points and Authorities Pursuant to the Court's Memorandum Opinion and Order of February 9, 1998 at 10 n.4. The second counterclaim (defamation) and the fifth counterclaim (abuse of process) are deficient because of their integral relationship to the legitimate pursuit by plaintiff of this lawsuit. Finally, when viewed in the context of the petty and niggling conduct of counsel for both parties, all of the counterclaims should be seen as designed primarily to harass. All five counterclaims therefore are properly dismissed under Rule 11 of the Federal Rules of Civil Procedure.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO: 97-0423 (PLF)

MARINA MANAGEMENT SERVICES., INC
As Agent for MIF REALTY, LP (d/b/a)
JAMES CREEK MARINA
Plaintiff

v.

VESSEL MY GIRLS,
(a.k.a. MY GIRL II and JENNY LYNN) *IN REM*
Defendant,

and

JOHN SINGLETON, IN PERSONAM
Defendant, Claimant.

JOHN SINGLETON,
Counter-plaintiff

v.

MARINA MANAGEMENT SERVICES., INC
As Agent for MIF REALTY, LP (d/b/a)
JAMES CREEK MARINA
Counter-Defendant

January 5, 1999

ORDER AND JUDGMENT

For the reasons stated in the Memorandum Opinion issued this same day and in this Court's Memorandum Opinion of February 9, 1998, it is hereby

ORDERED that plaintiff's motion for summary judgment is GRANTED; it is

FURTHER ORDERED that JUDGMENT is entered for plaintiff in the amount of $7,663.21, plus post-judgment interest at the rate of 5.391% per annum from the date of this Order; it is

FURTHER ORDERED that plaintiff is awarded $10,000 in attorneys' fees; defendant shall pay this amount within thirty (30) days from the date of this Order and post-judgment interest on this amount at the rate of 5.391 % per annum; and it is

FURTHER ORDERED that the judgment for plaintiff shall attach immediately to the security bond now posted with this Court, with said funds to be disbursed promptly to plaintiff by the Clerk of the Court.

SO ORDERED.

/s/ Paul L. Friedman
PAUL L. FRIEDMAN
United States District Judge

FILED January 6, 1999

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO: 97-0423 (PLF)

MARINA MANAGEMENT SERVICES., INC
As Agent for MIF REALTY, LP (d/b/a)
JAMES CREEK MARINA
Plaintiff

v.

VESSEL MY GIRLS,
(a.k.a. MY GIRL II and JENNY LYNN) *IN REM*

Defendant,

and

JOHN SINGLETON, IN PERSONAM
Defendant, Claimant.

JOHN SINGLETON,
Counter-plaintiff

v.

MARINA MANAGEMENT SERVICES., INC
As Agent for MIF REALTY, LP (d/b/a)
JAMES CREEK MARINA
Counter-Defendant

January 5, 1999

ORDER

For the reasons in the Memorandum Opinion issued this same day and in this Court's Order of February 9, 1988, it is hereby

ORDERED *sua sponte* that defendants' counterclaims are DISMISSED as frivolous and designed to harass and delay. *See* Rule 11, Fed. R. Civ. P. This is an appealable final Order. *See* Rule 54, Fed. R. Civ. P.;*cf, United States v. Haynes*, 158 F.3d 1327 (D.C.Cir. 1998).

SO ORDERED.

/s/ Paul L. Friedman
PAUL L. FRIEDMAN
United States District Judge

FILED January 6, 1999

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1999
97cv00423

No. 99-7017

Marina Management Services, Inc. d/b/a
James Creek Marina, as Agent for MIF Realty, LP
and Lisa Petti Ellis,

Appellants

v.

Vessel My Girls, a/k/a/ My Girl II,
Official Number: 659523, Her Engines, Masts,
Anchors, Cables Chains, Rigging, Tackle, apparel,
Furniture, and all the Necessaries Therewith Appertaining
and a/k/a Jenny Lynn, John Singleton,

Appellees.

Consolidated with 99-7018

FILED: March 29, 2000

BEFORE: EDWARDS, *Chief Judge*, ROGERS and TATEL, *Circuit Judges*.

ORDER

Upon consideration of appellees' petition for rehearing filed March 13, 2000, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES CREEK MARINA
200 V Street SW
Washington, D.C. 20024

Plaintiff

v.

VESSEL MY GIRLS (a.k.a. JENNY LYNN)
Official Number: 659523,
Her Engines, Masts, Anchors, Cables, Chains,
Rigging, Tackle, Apparel, Furniture, and
All The Necessaries Therewith Appertaining

IN REM,

and

JOHN SINGLETON
13208 Music Master Drive
Silver Spring, MD 20904

IN PERSONAM

Defendants

* * * * * * * * * * * * * * * * * * *

VERIFIED COMPLAINT TO FORECLOSE
MARITIME LIEN FOR NECESSARIES

James Creek Marina (hereafter "James Creek"), Plaintiff, by its undersigned attorneys, sues the Vessel MY GIRL, (a.k.a. JENNY LYNN), Official Number 659523 (hereafter "MY GIRL"), her engines, masts, anchors, cables, chains, rigging, tackle, apparel, furniture, and all the necessaries therewith appertaining, *in rem*, and John Singleton ("Singleton"), *in*

personam, and as grounds for its Verified Complaint states as follows:

JURISDICTION

1. This is a case of admiralty jurisdiction as hereinafter more fully appears and is an admiralty and maritime claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure. This Court has jurisdiction over this action pursuant to 46 U.S.C. §31342, 28 U.S.C. §1331 and 28 U.S.C. §1333.

PARTIES

2. Plaintiff, James Creek, is a marina and vessel docking facility with its principal place of business in Washington, D.C. James Creek is, among other things, engaged in the business of supplying dockage and other necessaries to vessels.

3. Defendant, Vessel MY GIRL, Official Number 659523, is a 1983 34 foot Silverton Convertible. According to the records of the United Sates Coast Guard, at all times pertinent hereto, the Vessel MY GIRL was owned by John Singleton, defendant. See U.S. Coast Guard Abstract of Title issued 2/19/97 and attached hereto as **EXHIBIT A**. She is presently located at James Creek Marina, 600 Water Street, SW, Washington, D.C. 20024 and is now within the jurisdiction of this Court.

4. Defendant, John Singleton, is an individual and resident of the state of Maryland.

FACTS

5. On or about February 3, 1994, Singleton executed a License Agreement ("Agreement") with James Creek, under which James Creek agreed to lease storage/docking space to Singleton for the vessel MY GIRL for the monthly amount of

$198.50 minus a $16.50 promotional credit. A copy of the Rental Agreement is attached hereto as **EXHIBIT B**. The term of the Agreement was extending by the parties in writing until June 7, 1996.

6. Singleton failed to make timely payments as required by the Rental Agreement. Specifically, Singleton failed to make monthly payments in the amount of $181.50 per month from August 22, 1995 to date, despite due demand.

7. Singleton's last payment was made on August 22, 1995. A default has, therefore, occurred under the Agreement and continues to occur.

8. At all times since February 3, 1994, up to and including the present, James Creek provided and continues to provide necessary dockage and electrical services essential for the well being of the vessel MY GIRL, in full compliance with the Agreement.

9. By virtue of 46 U.S.C. §31342(a) and under the terms of the Agreement with Singleton, James Creek has a valid maritime lien against the Vessel MY GIRL, her engines, masts, etc., in rem., and an *in personam* contractual claim against Singleton for the unpaid costs of the necessary services provided which total $26,015.67, as of February 28, 1997, plus $25.50 per day for each day thereafter, plus fees for electricity and services which continue to be provided to the vessel, plus attorneys fees, court costs and costs of these proceedings including custodia legis expenses. (See ***EXHIBIT B*** at ¶§14, 16, 19, and 20) An itemized invoice of James Creek Marina is attached hereto and incorporated by reference herein as ***EXHIBIT C***. All amounts prayed for in this Complaint are specifically provided for by the Agreement, including transient rates, costs and attorneys fees, and are deemed part of James Creek's maritime lien against the vessel.

COUNT I
ACTION *IN REM*
AGAINST VESSEL MY GIRL

10. James Creek incorporates herein by reference the allegations contained in paragraphs 1 through 9 of this verified Complaint.

11. By reason of Singleton's failure to pay for the necessary services he contracted for and received from James Creek for the benefit of the vessel MY GIRL, James Creek is entitled to immediate foreclosure of its maritime lien on the Vessel MY GIRL, Official Number 659523, and recovery of all sums due thereunder.

WHEREFORE, James Creek demands judgment against Singleton and the Vessel MY GIRL, Official Number 659523 as follows:

(A) That process *in rem* and a warrant of arrest be issued in due form of law in accordance with the practice of this Honorable Court in cases of admiralty and maritime jurisdiction against the Vessel MY GIRL, Official Number 659523, her engines, masts, anchors, cables, chains, rigging, tackle, apparel, furniture, and all the necessaries therewith appertaining, with notice to all persons claiming an interest therein to appear in answer to this verified Complaint;

(B) That the maritime lien for necessaries on the Vessel MY GIRL, Official Number 659523 be declared a valid and subsisting maritime lien upon the Vessel MY GIRL, Official Number 659523, her engines, masts, anchors, cables, chains, rigging, tackle, apparel, furniture, and all the necessaries therewith appertaining, prior and superior to the interests, liens, and claims of all persons or corporations whatsoever, except such persons or corporations as may hold preferred maritime liens on the Vessel MY GIRL, Official Number 659523;

(C) That this Honorable Court shall direct the manner in which the actual notice of the commencement of this suit shall be given by James Creek to the Custodian of the Vessel MY GIRL, Official Number 659523;

(D) That the Vessel MY GIRL, Official Number 659523, her engines, masts, anchors, cables, chains, rigging, tackle, apparel, furniture, and all the necessaries therewith appertaining, be condemned and sold by order of this Honorable Court and that James Creek be paid forthwith from the proceeds of such sale any and all amounts required to be paid by Singleton under the Agreement, including, without limitation, $26,015.67 as of February 28, 1997, plus $25.50 per day to the date of sale, plus costs of all services continuing to be provided to the vessel, plus custodia legis expenses, attorneys fees and costs of this proceeding;

(E) That judgment be entered in favor of James Creek against Singleton for any deficiency owed after the sale of the Vessel MY GIRL, Official Number 659523 and distribution of the proceeds thereof;

(F) That it be decreed that any and all persons or corporations claiming any interest in the Vessel MY GIRL, Official Number 659523 arising prior to the sale are thereafter barred and foreclosed of and from all right, equity of redemption, and claim of, in, or to the Vessel MY GIRL, Official Number 659523 and every part thereof, by reason of any such interest;

(G) That James Creek may have such other and further relief as the justice of its cause may require.

COUNT II
ACTION *IN PERSONAM*

12. James Creek incorporates herein by reference the allegations contained in paragraphs 1 through 11 of this Verified Complaint.

13. By reason of Singleton's ownership of the vessel and his authority to enter in to an Agreement with James Creek for the necessary services provided to the vessel MY GIRL by James Creek, and the fact that the vessel has received such services pursuant to that Agreement which were necessary to her safekeeping and condition but Singleton has failed to pay for such services, Singleton is indebted to James Creek in the amount of $26,015.67, plus $25.50 per day from February 28, 1997 to date of sale, plus costs for services continuing to be provided to the vessel for her safekeeping, condition and welfare, plus custodia legis fees, legal fees and costs of this proceeding;

WHEREFORE, James Creek demands judgment against John Singleton in the amount of $26,015.67, plus $25.50 per day from February 28, 1997 to date of sale, plus costs for services continuing to be provided to the vessel for her safekeeping, condition and welfare, plus custodia legis fees, legal fees and costs of this proceeding;, plus such other and further relief as the justice of its cause may require.

/s/ Lisa Petti Ellis
Lisa Petti Ellis, Esq. Federal Bar No.: 08307
Law Office of Lisa Petti Ellis
8370 Court Avenue, Suite 106
Ellicott City, Maryland 21043
(410) 461-8181
Attorney for James Creek, Plaintiff

ANNUAL BOAT STORAGE LICENCE AGREEMENT

Storage Space # ____ Wet Storage Space # *C-66*

Slip Size *36* Dock Box #____ Trailer Space #_____

(Wet storage does not include storage for trailers.)

This Agreement ("Agreement") is made this *4th* day of *March* 1994 by and between Washington D.C. Associates, a California general partnership ("Licensor") and *John A. Singleton* ("Licensee"). Licensor is the Concessioner and operator of James Creek Marina ("the Marina"). Licensee is the owner of and desires to procure storage space for, the vessel ("the Boat") described below:

Manufacturer *Silverton Conv*
Length *34* Beam *12*
Boat Name *My Girls*
Registration # *Doc 659523*
Year *83* Hull Color *White*
Trailer License #
Insurance Carrier/Agreement *Flagship Policy*
Address *410 (illegible) Avenue, Suite 227*
Annapolis, MD
Phone *1 800 262 8252*
Insurance Policy # *N 94 081-0016*
Licensor's Address: JAMES CREEK MARINA
200 V STREET SW
WASHINGTON DC 20024
Licensee's
Residence Address: *13208 Music Master Dr*

Residence Phone: *301 890-0747*
Business Name: *Aerotech, Corp*
Business Address *1221 11th St Wash, DC 20001*
Wash, DC 20001
Business Phone: *202-878-0877*

THE PARTIES AGREE AS FOLLOWS:

1. License Fees. Licensor licenses to Licensee, and Licensee Licenses from Licensor, the storage space(s) described above (the "Premises") for Storage of Licensee's Boat and other equipment. No bailment or deposit of goods for safekeeping is intended or created hereunder. Licensee shall pay to Licensor $*181.50* per month for a twelve-month period for boat storage fees; and $_____ as dock box fees. License fees are payable in advance on the first day of each month by automatic deduction on my *mastercard* credit card. Licensee shall pay to Licensor the cost of any utilities provided to the Premises upon Licensor delivery of any billing for such utility service. Licensee shall also pay when due all other fees and rental charges, where applicable.

2. Term of Agreement. The term of this Agreement shall commence on *1 April 94* and expire on *31 March 95*.

* * * * *

16. Breach of Agreement. If Licensee or Licensee's Agent breaches any provision of this Agreement or violates any rule, then, notwithstanding Sections 2 and 3, Licensor may terminate this Agreement immediately, remove the Boat from the Premises at Licensee's risk and expense and take possession of the Premises. Licensee agrees to pay the cost of any such action together with attorneys' fees.

* * * * *

19. Transient (Daily) Rate. If Licensee fails to pay an installment of license fees due hereunder within 15 days after it is due, the license granted hereby shall, at Licensor's option, become a day-to-day license at the Transient (Daily) Rate posted in the Marina's offices, with such changes to take effect automatically and without further notice to Licensee. Any

Unpaid charges to Licensee at the Transient (Daily) Rate shall be subject to collection as provided in this Agreement.

20. Lien for Nonpayment of License Fees and Other Charges. All unpaid charges for Licensee's license to use space for storage of the Boat and all other unpaid amounts due from Licensee hereunder shall give rise to a federal maritime lien and to all other rights and remedies available to Licensor, both in rem and personal, under both state and federal law. Further, if Licensor, at the express or implied written or oral request of the Licensee, furnishes any utilities or supplies, including fuel, maritime hardware, accessories or other goods or materials, or performs services of any sort, including making repairs relating directly or indirectly to the Boat or for the benefit of Licensee or others associated with Licensee, the charges therefor, until paid, shall give Licensor a maritime lien in the amount of the charges to the fullest extent permitted by law, and shall also entitle Licensor to all other remedies available under state or federal law. All expenses, including attorneys' fees and costs, incurred by Licensor in connection with the enforcement of is rights under this Agreement, including rights to liens, maritime and otherwise, and fees and costs incurred in any lien action, shall be paid by Licensee and may be included, at Licensor's option, in the amount of any lien, state of federal, which Licensor may have against Licensee or the Boat.

21. Concession Contract. If any terms or conditions of this Agreement are inconsistent with the terms or conditions of National Park Service Contract No. CC-NACE006-88 dated September 6, 1988, under which Licensor holds the concession to operate the Marina, or the Maintenance Agreement and Operating Plan for the operation of the Marina entered into under such contract (collectively, the "Concession Contract"), then the terms of the Concession Contract shall prevail and the inconsistent term or terms of this Agreement shall be void.

* * * * *

Note: The italicized portions of the preceding agreement were written by hand on a preprinted form.

Statement

James Creek Marina
___ V Street, S.W.
Washington, DC 20024

2/28/97

PAGE 1

To: John Singleton
13208 Music Mastr Dr.
Silver Spring, MD 20904

HOME: 301/890-0747WORK: 202-878-0899

ACCOUNT # B 58

DATE	INV/CK #	DESCRIPTION	DUE	CHARGES	PAYMENTS	BALANCE
						198.00
7/22/94	M MM9408	PREPAID-MONTH	08/10/94	198.00		181.50
8/11/94		CREDIT MEMO PD9408 APPLIED			16.50	165.00
8/15/95		CREDIT MEMO PD9504 APPLIED			16.50	31.67
8/22/95	TC45-043	PAYMENT ON INVOICE MM9408			133.33	0.00
8/11/96	91	PAYMENT ON INVOICE MM9408			31.67	198.00
8/11/94	M MM9409	PREPAID - MONTH	09/10/94	198.00		181.50
8/11/94		CREDIT MEMO PD9409 APPLIED			16.50	0.00
6/31/96	91	PAYMENT ON INVOICE MM 9409			181.50	198.00
9/19/94	M MM9410	PREPAID - MONTH	10/10/94	198.00		181.50
9/19/94		CREDIT MEMO PD9410 APPLIED			16.50	0.00
6/31/96	91	PAYMENT ON INVOICE MM9410			181.50	198.00
__/24/94	M MM9411	PREPAID - MONTH	11/10/94	198.00		181.50
__/22/94		CREDIT MEMO PD 9411 APPLIED			16.50	

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DATE	INV/CK #	DESCRIPTION	DUE	CHARGES	PAYMENTS	BALANCE
						0.00
5/31/96	91	PAYMENT OF INVOICE MM9411			181.50	198.00
1/22/94	M MM9412	PREPAID - MONTH	12/10/94	198.00		181.50
1/22/94		CREDIT MEMO PD9412 APPLIED			16.50	0.00
5/31/96	91	PAYMENT ON INVOICE MM9412			181.50	198.00
2/19/94	M MM9501	MONTHLY SLIP	01/10/95	198.00		181.50
2/19/94		CREDIT MEMO PD9501 APPLIED			16.50	0.00
5/31/96	91	PAYMENT ON INVOICE MM9501			181.50	198.00
1/18/95	M MM9502	MONTHLY SLIP	02/10/95	198.00		181.50
1/18/95		CREDIT MEMO PD9502 APPLIED			16.50	120.67
5/31/96	91	PAYMENT ON INVOICE MM9502			60.83	318.67
2/20/95	M MM9503	MONTHLY SLIP	03/10/95	198.00		516.67
3/15/95	M MM9504	MONTHLY SLIP	04/10/95	198.00		714.67
4/20/95	M MM9505	MONTHLY SLIP	05/10/95	198.00		698.17
4/20/95		CREDIT MEMO PD9505 APPLIED			16.50	

JAMES CREEK
EXHIBIT C

Statement

James Creek Marina
___ V Street, S.W.
Washington, DC 20024

2/28/97

To: John Singleton
13208 Music Mastr Dr.
Silver Spring, MD 20904

HOME: 301/890-0747 WORK: 202-878-0899

ACCOUNT # B 58

DATE	INV/CK #	DESCRIPTION	DUE	CHARGES	PAYMENTS	BALANCE
						896.17
6/24/95	H MM9506	MONTHLY SLIP	06/10/95	198.00		1094.17
6/19/95	M MM9507	MONTHLY SLIP	07/10/95	198.00		1292.17
7/20/95	M MM9508	MONTHLY SLIP	08/10/95	198.00		1275.67
		CREDIT MEMO PD9508 APPLIED			16.50	1473.67
	M MM9509	MONTHLY SLIP	09/10/95	198.00		1457.17
8/18/95		CREDIT MEMO PD9509 APPLIED			16.50	1467.17
9/21/95	M DB 9510	DOCK BOX	10/10/95	10.00		1665.17
9/21/95	M MM9510	MONTHLY SLIP	10/10/95	198.00		1648.67
9/21/95		CREDIT MEMO PD9510 APPLIED			16.50	2458.67
9/30/95	D 459	TRANSIENT	10/10/95	810.00		

DATE	INV/CK #	DESCRIPTION	DUE	CHARGES	PAYMENTS	BALANCE
10/20/95	M DB9511	DOCK BOX	11/10/95	10.00		2468.67
10/20/95	M MM9511	MONTHLY SLIP	11/10/95	198.00		2666.67
10/20/95		CREDIT MEMO PD9511 APPLIED			16.50	2650.17
10/31/95	D 460	TRANSIENT	11/10/95	918.00		3568.17
11/20/95	M DB9512	DOCK BOX	12/10/95	10.00		3578.17
11/20/95	M MM9512	MONTHLY SLIP	12/10/95	198.00		3776.17
11/20/95		CREDIT MEMO PD9512 APPLIED			16.50	3759.67
11/30/95	D 461	TRANSIENT	12/10/95	882.00		4641.67
12/18/95	M DB 9601	DOCK BOX	01/10/96	10.00		4651.67
12/18/95	M MM9601	MONTHLY SLIP	01/10/96	198.00		4849.67
12/18/95		CREDIT MEMO PD9601 APPLIED			16.50	4833.17
12/31/95	D 462	TRANSIENT	01/10/96	918.00		5751.17
1/19/96	M DB 9602	DOCK BOX	02/10/96	10.00		5761.17
1/19/96	M MM9602	MONTHLY SLIP	02/10/96	198.00		5959.17
1/19/96		CREDIT MEMO PD9602 APPLIED			16.50	5942.67
01/31/96	D 463	TRANSIENT	02/10/96	918.00		6860.67
02/19/96	M DB 9603	DOCK BOX	03/10/96	10.00		6870.67

EXHIBIT C
COMPLAINT

Statement

James Creek Marina
___ V Street, S.W.
Washington, DC 20024

2/28/97

PAGE 3

To: John Singleton
13208 Music Mastr Dr.
Silver Spring, MD 20904

HOME: 301/890-0747 WORK: 202-878-0899

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ACCOUNT # B 58

DATE	INV/CK #	DESCRIPTION	DUE	CHARGES	PAYMENTS	BALANCE
						7068.67
2/19/96	M MM9603	MONTHLY SLIP	03/10/96	198.00		7052.17
2/19/96		CREDIT MEMO PD 9603 APPLIED			16.50	7898.17
2/29/96	D 464	TRANSIENT	03/10/96	846.00		7908.17
3/25/96	M DB9604	DOCK BOX	04/10/96	10.00		8106.17
_/__/96	M MM9604	MONTHLY SLIP	04/10/96	198.00		8089.67
3/25/96		CREDIT MEMO PD9604 APPLIED			16.50	9007.67
_/31/96	D 465	TRANSIENT	04/10/96	918.00		9017.67
_/23/96	M DB9605	DOCK BOX	05/10/96	10.00		9215.67
_/23/96	M MM9605	MONTHLY SLIP	05/10/96	198.00		9199.17
_/23/96		CREDIT MEMO PD9605 APPLIED			16.50	

DATE	INV/CK #	DESCRIPTION	DUE	CHARGES	PAYMENTS	BALANCE
_/30/96	D 466	TRANSIENT	05/10/96	882.00		10001.17
_/31/96	D 467	TRANSIENT	06/10/96	918.00		10999.17
6/30/96	D 468	TRANSIENT	07/10/96	882.00		11881.17
6/30/96	M DB9606	DOCK BOX	07/10/96	10.00		11891.17
7/30/96	M DB9607	DOCK BOX	08/10/96	10.00		11901.17
7/30/96	D MM9606	MONTHLY SLIP	08/10/96	198.00		12099.17
7/30/96		CREDIT MEMO PD9606 APPLIED			16.50	12082.67
7/30/96	D MM9607	MONTHLY SLIP	08/10/96	198.00		12280.67
7/30/96		CREDIT MEMO PD9607 APPLIED			16.50	12264.17
7/30/96	M NF9607	NSF CHECKS	08/10/96	1000.00		13264.17
7/31/96	D 469	TRANSIENT	08/10/96	918.00		14182.17
8/30/96	M DB9608	DOCK BOX	09/10/96	10.00		14192.17
8/31/96	D 470	TRANSIENT	09/10/96	918.00		15110.17
9/30/96	D 471	TRANSIENT	10/10/96	882.00		15992.17
9/30/96	M DB9609	DOCK BOX	10/10/96	10.00		16002.17
10/31/96	D 472	TRANSIENT	11/10/96	918.00		16920.17
10/31/96	M DB9610	DOCK BOX	11/10/96	10.00		16930.17

EXHIBIT C
COMPLAINT

Statement

James Creek Marina
___ V Street, S.W.
Washington, DC 20024

2/28/97

PAGE 4

To: John Singleton
13208 Music Mastr Dr.
Silver Spring, MD 20904

HOME: 301/890-0747 WORK: 202-878-0899

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ACCOUNT # B 58

DATE	INV/CK #	DESCRIPTION	DUE	CHARGES	PAYMENTS	BALANCE
						17128.17
11/21/96	D MM9608	MONTHLY SLIP	12/10/96	198.00		17326.17
11/21/96	D MM9609	MONTHLY SLIP	12/10/96	198.00		17524.17
11/21/96	D MM9610	MONTHLY SLIP	12/10/96	198.00		17722.17
11/21/96	D MM9611	MONTHLY SLIP	12/10/96	198.00		18604.17
__/__/96	D 473	TRANSIENT	12/10/96	882.00		18614.17
__/__/96	M DB9611	D0CK BOX	12/10/96	10.00		19532.17
12/31/96	D 474	TRANSIENT	01/10/97	918.00		19542.17
12/31/96	M DB9612	DOCK BOX	01/10/97	10.00		19740.17
1/16/97	D MM9612	MONTHLY SLIP	02/10/97	198.00		19938.17
1/16/97	D MM9701	MONTHLY SLIP	02/10/97	198.00		

DATE	INV/CK #	DESCRIPTION	DUE	CHARGES	PAYMENTS	BALANCE
						20136.17
1/16/97	M MM9702	MONTHLY SLIP	02/10/97	198.00		21054.17
1/31/97	D 476	TRANSIENT	02/10/97	918.00		21064.17
1/31/97	M DB9701	DOCK BOX	02/10/97	10.00		21245.67
2/28/97	M 458	Promotional Dis	03/10/97	181.50		22055.67
2/28/97	D 475	TRANSIENT	03/10/97	810.00		22065.67
2/28/97	M DB9702	DOCK BOX	03/10/97	10.00		

CURRENT	1-30 DAYS	31-60 DAYS	OVER 60 DAYS	NEW BALANCE
1001.50	1522.00	928.00	18614.17	22065.67

EXHIBIT C
COMPLAINT

VERIFICATION BY DECLARATION
UNDER PENALTY OF PERJURY
PURSUANT TO 28 U.S.C. § 1746

I, DAMIAN BUCKLEY, declare under penalty of perjury as follows:

1. I am over eighteen (18) years of age and have personal knowledge of and am competent to testify to the facts contained in this Declaration.

2. I am the General Manager of James Creek Marina ("James Creek") with responsibilities concerning James Creek's accounting, accounts receivable and slip rental.

3. I am familiar with the books and records of James Creek for the account of John Singleton referred to in the foregoing Verified Complaint.

4. I have read the foregoing verified Complaint and it is true and accurate to the best of my knowledge, information and belief, based on my review of the documents held by James Creek for the loan account of Singleton.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED THIS 26TH DAY OF FEBRUARY, 1997, AT WASHINGTON, D.C.

/s/ Damian Buckley
DAMIAN BUCKLEY
GENERAL MANAGER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARINA MANAGEMENT SERVICES, INC.
200 West Palmetto Park Road,
Suite 302
Boca Raton, Florida 33432
As Agent for
MIF REALTY, LP
600 E. Las Colinas Blvd.
Suite 1900
Irving, Texas 75039
(d/b/a)
JAMES CREEK MARINA
200 V Street SW
Washington, D.C. 20024

Plaintiff,

v.

VESSEL MY GIRLS (a.k.a. JENNY LYNN)
Official Number: 659523,
Her Engines, Masts, Anchors, Cables, Chains,
Rigging, Tackle, Apparel, Furniture, and
All The Necessaries Therewith Appertaining

IN REM,

and

JOHN SINGLETON
13208 Music Master Drive
Silver Spring. MD 20904

IN PERSONAM

Defendants

CIVIL ACTION NO: 97-0423-PLF

* * * * * * * * * * * * * * * * * * * *

AMENDED VERIFIED COMPLAINT TO
FORECLOSE MARITIME LIEN FOR NECESSARIES

Marina Management Services, Inc., as agent for MIF Realty, LP, d/b/a James Creek Marina (hereafter "James Creek")[1], Plaintiff, by it undersigned attorneys, sues the Vessel MY GIRL (a.k.a JENNY LYNN), Official Number 659523 (hereafter "MY GIRL"), her engines, masts, anchors, cables, chains, rigging, tackle, apparel, furniture, and all the necessaries therewith appertaining, *in rem*, and John Singleton ("Singleton"), in *personam*, and as grounds for its Verified Complaints states as follows:

JURISDICTION

1. This is a case of admiralty jurisdiction as hereinafter more fully appears and is an admiralty and maritime claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure. This Court has jurisdiction over this action pursuant to 46 U.S.C. §31342, 28 U.S.C. §1331 and 28 U.S.C. §1333.

PARTIES

2. **Plaintiff, Marina Management Services, Inc., as agent for MIF Realty, L.P., d/b/a James Creek Marina is an**

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[1] **James Creek Marina has been owned and operated by various entities and property managers during Defendant Singleton's stay at the marina. Because ownership and management frequently changes, the marina is known by its patrons simply as "James Creek" or "James Creek Marina" and shall be identified as such here. The marina has its own bank account in the name of "James Creek Marina" and all payments made to the marina are made payable to "James Creek Marina" and not to Marina Management, Services, Inc. or any other entity.**

incorporated entity under the laws of Florida and doing business in Washington, D.C., as the operating management company for James Creek Marina. It is authorized to, among other things, collect all past and presents debts owed to James Creek Marina under the marina's past and present License Agreements. Additionally, it is authorized to provide storage, dockage, fuel and other necessaries to vessels kept at James Creek Marina.

3. Defendant, Vessel MY GIRL, Official Number 659523, is a 1983 34 foot Silverton Convertible. According to the records of the United States Coast Guard, at all times pertinent hereto, the Vessel MY GIRL was owned by John Singleton, defendant. *See* U.S. Coast Guard Abstract of Title issued 2/19/97 and attached hereto as ***EXHIBIT A.*** She is presently located at Gangplank Marina, 600 Water Street, SW, Washington, D.C. 20024 and is now within the jurisdiction of this Court.

4. Defendant, John Singleton, is an individual and resident of the state of Maryland.

FACTS

5. **On or about February 3, 1994, April 1, 1994 and May 1, 1994, Singleton executed various License Agreements ("Agreements")** with James Creek, under which James Creek agreed to lease storage/docking space to Singleton for the vessel MY GIRL for the monthly amount $198.00 minus a $16.50 promotional credit. **Copies of the License Agreements** are attached hereto as ***EXHIBIT B***. The term of the Agreements was extended by the parties in writing until June 7, 1996.

6. Singleton failed to make timely payments as required by the Agreements. Specifically, Singleton failed to make

monthly payment in the amount of $181.50 per month from **April 1, 1194** to date, **with the exception on one payment of $800.00 which was made on August 22, 1995, despite due demand.**[2]

7. **Singleton's only payment was for $800.00 and was made on August 22, 1995. A default has, therefore, occurred under the Agreements and continues to occur.**

8. **Pursuant to the terms of paragraph 19 of the Agreements, as a result of Singleton's TOTAL failure to make the required monthly dockage payments of $181.50, for three (3) consecutive years, Singleton is also responsible for paying transient daily fees of $25.50 ($0.75 per foot per day) for each day that he and the Vessel MY GIRLS benefitted by and from the marina's services without paying for them, plus late fees, all costs of collection and attorneys fees.**

9. **At all times pertinent to this Complaint, James Creek provided necessary dockage, fuel, electrical services and other services essential for the well being of the vessel MY GIRL, in full compliance with the Agreements.**

10. **By virtue of paragraph 20 of the Agreements, all unpaid amounts for dockage "and all other unpaid amount dues from Licensee" give James Creek Marina a maritime lien for necessaries as available under "federal law."**

11. By virtue of 46 U.S.C. §31342(a) **and under paragraph 20 of the Agreements** with Singleton, James Creek has a valid maritime line against the Vessel MY GIRL, her

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[2] **Singleton was only entitled to a promotional discount of $16.50 if he prepaid his rental charges. In reality he put his charges on a non-valid MasterCard so he had effectively not prepaid and was technically not eligible for the promotional discount. He was, however, invoiced at the discounted rate and it is on this rate that all fees are based.**

engines, masts, etc., *in rem*, and an *in personam* contractual claim against Singleton for the unpaid costs of the necessary services provided which total **$30,218.61, as of June, 1997**, plus $25.50 per day for each day thereafter, plus fees for electricity and services which continue to be provided to the vessel, plus attorneys fees, court costs and costs of these proceeding including *custodia legis* expenses. (See ***EXHIBIT B*** at ¶ ¶ 14, 16, 19, and 20). An itemized invoice of James Creek Marina is attached hereto and incorporated by reference herein as ***EXHIBIT C***. All amounts prayed for in the Complaint are specifically provided for by the Agreements, including transient rates, costs and attorneys fees, and are deemed part of James Creek's maritime lien against the vessel.

COUNT I
ACTION *IN REM*
AGAINST VESSEL MY GIRL

12. James Creek incorporates herein by reference the allegations contained in paragraphs 1 through **11** of this **Amended** Verified Complaint.

13. By reason of Singleton's failure to pay for the necessary services he contracted for and received from James Creek for the benefit of the Vessel MY GIRL, James Creek is entitled to immediate foreclosure of its maritime lien on the Vessel MY GIRL, Official Number 659523, and recovery of all sum due thereunder.

WHEREFORE, James Creek demands judgment against Singleton and the Vessel MY GIRL, Official Number 659523, as follows:

(A) That process in *rem* and a warrant of arrest be issued in due form of law in accordance with the practice of this Honorable Court in cases of admiralty and maritime jurisdiction against the Vessel MY GIRL, Official Number

659523, her engines, masts, anchors, cables, chains, rigging, tackle, apparel, furniture, and all the necessaries therewith appertaining, with notice to all persons claiming an interest therein to appear in answer to this verified Complaint;

(B) That the maritime lien for necessaries on the Vessel MY GIRL, Official Number 659523 be declared a valid and subsisting maritime lien upon the Vessel MY GIRL, Official Number 659523, her engines, masts, anchors, cables, chains, rigging, tackle, apparel, furniture, and all the necessaries therewith appertaining, prior and superior to the interests, liens, and claims of all persons or corporations whatsoever, except such persons or corporations as may hold preferred maritime liens on the Vessel MY GIRL, Official Number 659523;

(C) That this Honorable Court shall direct the manner in which the actual notice of the commencement of this suit shall be given by James Creek to the Custodian of the Vessel MY GIRL, Official Number 659523;

(D) That the Vessel MY GIRL, Official Number 659523, her engines, mast, anchors, cables, chains, rigging, tackle, apparel, furniture, and all the necessaries therewith appertaining, be condemned and sold by order of this Honorable Court and that James Creek be paid forthwith from the proceeds of such sale any and all amounts required to be paid by Singleton under the Agreements, including, without limitation, **$30,218.61 as of June, 1997**, plus $25.50 per day to the date of sale, **plus costs of electricity**, plus costs of all services continuing to be provided to the vessel, plus custodia legis expenses, attorneys fees and costs of this proceeding;

(E) That judgment be entered in favor of James Creek against Singleton personally for any deficiency owed after the sale of the Vessel MY GIRL, Official Number 659523 and distribution of the proceeds thereof;

(F) That it be decreed that any and all persons or corporations claiming any interest in the Vessel MY GIRL, Official Number 659523 arising prior to the sale are thereafter barred and foreclosed of and from all right, equity of redemption, and claim of, in, or to the Vessel MY GIRL, Official Number 659523 and every part thereof, by reason of any such interest;

(G) That James Creek may have such other and further relief as the justice of its cause may require.

COUNT II
ACTION *IN PERSONAM*

14. James Creek incorporates herein by reference the allegations contained in paragraphs 1 through 13 of this Verified Complaint.

15. By reason of Singleton's ownership of the vessel and his authority to enter in to an Agreements with James Creek for the necessary services provided to the Vessel MY GIRL by James Creek, and the fact that the vessel has received such services pursuant to that Agreements which were necessary to her safekeeping and condition but Singleton bas failed to pay for such services, Singleton is indebted to James Creek in the amount of **$30,218.61, as of June, 1997** plus $25.50 per day to date of sale, plus cost **of electricity and** for services continuing to be provided to the vessel for her safekeeping, condition and welfare, plus *custodia legis* fees, legal fees and costs of this proceeding;

WHEREFORE, James Creek demands judgement against John Singleton in the amount of **$30,218.61, as of June, 1997** plus $25.50 per day to date of sale, **plus all costs for electricity which was provided to the vessel during the term of the Agreements**, plus costs for services continuing to be provided to the vessel for her safekeeping, condition and welfare, plus

custodia legis fees, legal fees and costs of this proceeding, plus such other and further relief as the justice of its cause may require.

/s/ Lisa Petti Ellis
Lisa Petti Ellis, Esq. Federal Bar No.: 08307
Law Office of Lisa Petti Ellis
8370 Court Avenue, Suite 106
Ellicott City, Maryland 21043
(410) 461-8181
Attorney for James Creek, Plaintiff

[Certificate of service omitted in printing]

VERIFICATION BY DECLARATION UNDER PENALTY OF PERJURY
PURSUANT TO 28 U.S.C.§ 1746

I, DAMIAN BUCKLEY, declare under penalty of perjury as follows:

1. I am over eighteen (18) years of age and have personal knowledge of and am competent to testify to the facts contained in this Declaration.

2. I am the General Manager of James Creek Marina ("James Creek") with responsibilities concerning James Creek's Accounting, accounts receivable and slip rental.

3. I am familiar with the books and records of James Creek for the account of John Singleton referred to in the foregoing Verified Complaint.

4. I have read the foregoing Verified Complaint and it is true and accurate to the best of my knowledge, information and belief, based on my review of the documents held by James Creek for the loan account of Singleton.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED THIS 26th DAY OF FEBRUARY, 1997, AT WASHINGTON. D.C.

/s/ Damian Buckley
DAMIAN BUCKLEY
GENERAL MANAGER

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO: 97-0423

MARINA MANAGEMENT SERVICES., INC
As Agent for MIF REALTY, LP (d/b/a)
JAMES CREEK MARINA
Plaintiff

v.

VESSEL MY GIRLS,
(a.k.a. MY GIRL II and JENNY LYNN) ***IN REM***

Defendant,

and

JOHN SINGLETON, IN PERSONAM
Defendant, Claimant.

JOHN SINGLETON,
Counter-plaintiff

v.

MARINA MANAGEMENT SERVICES., INC
As Agent for MIF REALTY, LP (d/b/a)
JAMES CREEK MARINA
Counter-Defendant

AMENDED ANSWER AND COUNTERCLAIMS

Defendant and claimant JOHN SINGLETON, for himself and for defendant vessel MY GIRLS, by and through his attorneys, Condon & Forsyth, for his Answer to the Amended Verified Complaint herein states:

AS TO JURISDICTION

1. Denies the allegations contained in paragraph 1 of the Amended Verified Complaint, except that the defendant admits that this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1333.

AS TO THE PARTIES

2. Defendants lack sufficient knowledge and information to admit or deny the allegations contained in paragraph 2 of the Amended Verified Complaint.

3. Denies that defendant Vessel MY GIRLS (the Vessel) was within the jurisdiction of the Court at the time that the Vessel was seized, denies that the defendant MY GIRLS is located at Gangplank Marina, admits the allegations contained in paragraph 3 of the Amended Verified Complaint which describe the Vessel.

4. Admits the allegations contained in paragraph 4 of the Amended Verified Complaint.

AS TO THE FACTS

5. Denies the allegations contained in paragraph 5 of the Amended Verified Complaint.

6. Denies the allegations contained in paragraph 6 of the Amended Verified Complaint.

7. Denies the allegations contained in paragraph 7 of the Amended Verified Complaint.

8. Denies the allegations contained in paragraph 8 of the Amended Verified Complaint.

9. Denies the allegations contained in paragraph 9 of the Amended Verified Complaint.

10. Denies the allegations contained in paragraph 10 of the Amended Verified Complaint.

11. Denies the allegations contained in paragraph 11 of the Amended Verified Complaint.

AS TO COUNT I

12. Answering paragraph 12 of the Amended Verified Complaint, repeats, reiterates and realleges each and every admission, denial or statement contained in paragraphs 1 to 11 of this Answer with the same force and effect as if herein set forth in full.

13. Denies the allegations contained in paragraph 13 of the Amended Verified Complaint.

AS TO COUNT II

14. Answering paragraph 14 of the Amended Verified Complaint, repeats, reiterates and realleges each and every admission, denial or statement contained in paragraphs 1 to 13 of this Answer with the same force and effect as if herein set forth in full.

15. Denies the allegations contained in paragraph 15 of the Amended Verified Complaint.

FIRST AFFIRMATIVE DEFENSE

16. The doctrine of accord and satisfaction bars plaintiff's actions.

SECOND AFFIRMATIVE DEFENSE

17. Plaintiffs claims are barred by the doctrine of waiver.

THIRD AFFIRMATIVE DEFENSE

18. The action should be dismissed for failure to state a claim upon which relief can be granted.

FOURTH AFFIRMATIVE DEFENSE

19. This Court lacks in rem jurisdiction over defendant vessel MY GIRLS.

FIFTH AFFIRMATIVE DEFENSE

20. This action should be dismissed under the doctrine of laches.

SIXTH AFFIRMATIVE DEFENSE

21. Prior to the commencement of this action and on or about August 18, 1995, John Singleton made partial payment on the debt plaintiffs' allege is due and owing. To the extent, defendant has made partial payment, this action is barred.

SEVENTH AFFIRMATIVE DEFENSE

22. In order to induce defendant John Singleton to remove defendant vessel MY GIRL from the marina, plaintiff's agent represented that defendant John Singleton's slip rental contract with the plaintiff would be satisfied if defendant John Singleton removed defendant vessel MY GIRL from the marina.

The statements and representations made by the plaintiff's agent were false and fraudulent and were known to plaintiff to be false and fraudulent when made.

In truth and in fact, plaintiff has demanded payment of monies allegedly owed under the slip rental contract.

Defendant John Singleton believed such representations to be true and was induced thereby to remove his boat and to not make payment under the contract.

EIGHTH AFFIRMATIVE DEFENSE

23. Plaintiff in December 1996, for good and valuable consideration, duly released and discharged defendant John

Singleton from the alleged claim set forth in the Amended Verified Complaint.

NINTH AFFIRMATIVE DEFENSE

24. Prior to instituting this action, plaintiff never included transient (late) fees in its invoices to defendant John Singleton, and has therefore waived this provision of the contract and is estopped from demanding such fees.

TENTH AFFIRMATIVE DEFENSE

25. This action should be dismissed for failure to join an indispensable party.

COUNTERCLAIMS

COUNTERCLAIM NO. 1
PROPERTY DAMAGE

26. Repeats, reiterates and realleges the allegations and statements contained in paragraphs 1-23 of this Amended Answer and Counterclaims as if set out here in full.

27. By order of this Court dated March 5, 1997, plaintiff Marina Management Services, Inc., as the entity claiming to be James Creek Marina, was appointed substitute custodian of defendant's Vessel MY GIRLS. On or about March 5, 1997, the United States Marshall Service delivered the Vessel together with all property on board into the custody of Marina Management Services, Inc. to be kept safely and securely and to be disposed of as ordered by this Court. At the time the Vessel was delivered into the custody of Marina Management Services, Inc, the following items were on board the Vessel and also delivered into the custody of Marina Management Services, Inc.: a hand held VHF radio, a Garmin GPS receiver, a Data Marine depth sounder, two fire extinguishers, a shore power cord, a phone cord and a "Y" adaptor to the power cord.

28. Thereafter on July 10, 1997 the Court ordered the Vessel released to the defendant/ counter-plaintiff Singleton and Singleton demanded the delivery of the Vessel and all property which had been on board at the time the Vessel was delivered into the custody of Marina Management Services, Inc., but because of the substitute custodian's negligence the property was either lost, stolen or damaged. The substitute custodian failed to return to John Singleton the following items: a hand held VHF radio, a Garmin GPS receiver, a Data Marine depth sounder, two fire extinguishers, a shore power cord, a phone cord and a "Y" adaptor to the power cord. The substitute custodian delivered the Vessel to John Singleton in damaged condition in that the propellers, bilge pumps, electrical system and port side railing were damaged.

29. Because defendant\counter-plaintiff's Vessel was in damaged condition, on or about July 10, 1997, Singleton delivered the Vessel and all property aboard and attached to the Vessel including a rubber dingy back into the custody of Marina Management Services, Inc. and Marina Management Services, Inc. accepted custody of the above described property to keep safely and securely and to be redelivered to Singleton upon demand. On or about July 11, 1997, Singleton demanded delivery of the Vessel including the dingy, but because of plaintiff's negligence the dingy was either lost or stolen. The plaintiff failed to redeliver the dingy to Singleton.

COUNTERCLAIM NO. 2
DEFAMATION

30. Repeats, reiterates and realleges the allegations and statements contained in paragraph 1-29 of this Amended Answer and Counterclaims as if set out here in full.

31. Upon information and belief, on or about the period of March 1, 1997 to the present date, plaintiff Marina Management Services Inc. through its agents, negligently and

with malice caused to be published to third parties false statements including the following: that John Singleton stole parking passes from James Creek Marina and sold them to employees of the Coast Guard, that John Singleton had been arrested by the police, that John Singleton stole equipment off of another vessel berthed at James Creek Marina, that John Singleton owed James Creek Marina over $26,000.

32. The publication of these false and defamatory statements were intended to and did expose the defendant\counter-plaintiff John Singleton to scorn, hatred contempt or ridicule and thereby discouraged other marina operators and marine service providers from having a good opinion of, or from associating or dealing with, defendant\counter-plaintiff.

33. As a direct consequence of the publication of these false and defamatory statements, defendant\counter-plaintiff has suffered mental anguish, distress and humiliation, and has been unable to procure marine services or to find a berth for his Vessel in a timely manner.

COUNTERCLAIM NO. 3

INTENTIONAL INTERFERENCE WITH PROSPECTIVE CONTRACTUAL RELATIONS

34. Repeats, reiterates and realleges the allegations and statements contained in paragraph 1-33 of this Amended Answer and Counterclaims as if set out here in full.

35. As a direct consequence of the publication of the false and defamatory statements set forth in paragraph 29 of this Amended Answer and Counterclaims, defendant\counter-plaintiff has incurred great difficulty in securing a rental slip and procuring repairs to his Vessel.

36. Marina Management Services, Inc., by grossly exaggerating and falsely representing the amount claimed due and owing prevented the defendant\counter-plaintiff from obtaining the release and use of his Vessel. Plaintiff's actions directly and proximately caused defendant\counter-plaintiff to be unable to perform three separate contracts with third parties for the use of the Vessel causing defendant\counter-plaintiff to suffer significant damages.

COUNTERCLAIM NO. 4
WRONGFUL SEIZURE

37. Repeats, reiterates and realleges the allegations and statements contained in paragraph 1-36 of this Amended Answer and Counterclaims as if set out here in full.

38. On March 5, 1997 plaintiff Marina Management Services, Inc., in bad faith and with malice caused to be seized the defendant Vessel when the plaintiff was conducting business in the District of Columbia but was not registered to do business in the District of Columbia and therefore lacked the capacity to cause the defendant Vessel to be seized and to file suit in the District of Columbia. Plaintiff brought the herein action in its "trade name" in order to conceal the fact that plaintiff lacked capacity to sue. Plaintiff knowingly misrepresented to the Court the amount of the alleged claim causing the Vessel to be seized and preventing the defendant from obtaining the release of the Vessel in a timely manner.

39. On or about February 1997 defendant attempted to pay to plaintiff $4,000 in payment for the debt plaintiff alleges was due and owing. Plaintiff's agents refused to accept the defendant's payment. On March 5, 1997, plaintiff caused the defendant Vessel to be seized with knowledge that defendant had attempted to pay to the plaintiff most of the amount that plaintiff alleged was due and owing as of February 26, 1997.

40. As a direct and proximate cause of plaintiff's wrongful seizure of the Vessel, defendant\counter-plaintiff suffered mental anguish and humiliation and financial injury as he was unable to perform three time share agreements for the use of the Vessel, and because he was denied access to his business facilities aboard the Vessel, he was unable to procure contracts for his engineering consultant business and he lost clients for his boat cleaning business.

COUNTERCLAIM NO. 5
ABUSE OF PROCESS

41. Repeats, reiterates and realleges the allegations and statements contained in paragraph 1-40 of this Amended Answer and Counterclaims as if set out here in full.

42. On or about February 28, 1997, plaintiff Marina Management Services, Inc. fraudulently altered the records of defendant\counter-plaintiff's account to reflect a sum due and owing of $26,015.67 which plaintiff knew was false and fictitious. Plaintiff commenced an action on March 3, 1997 alleging that defendant\counter-plaintiff John Singleton was indebted to plaintiff in the false and fictitious amount of $26,015.67 and caused Singleton's Vessel to be arrested. Plaintiff fraudulently exaggerated the amount due and owing in order to injure the defendant\counter-plaintiff by preventing the defendant from obtaining the release of the vessel during the pendency of the litigation, to compel Singleton to pay and satisfy the false and fictitious claim made by the plaintiff.

43. Plaintiff through the above described misrepresentations to the Court caused the arrest of defendant's Vessel to be unnecessarily prolonged for the purpose of injuring Singleton.

44. As a result of the unlawful arrest of the Vessel MY GIRLS, the defendant suffered damages in that he was unable

to perform three timesharing contracts for the use of his boat and he lost clients to his boat cleaning business and prospective contracts for his consulting business, and suffered mental anguish and humiliation. In perpetrating the above acts plaintiff acted maliciously and without cause.

PRAYER FOR RELIEF

Wherefore the defendant\counter-plaintiff seeks compensatory and punitive damages in the amount of $200,000 and costs including attorneys' fees.

CONCLUSION

WHEREFORE, defendants MY GIRLS and JOHN SINGLETON demands judgment dismissing the Amended Verified Complaint in its entirety and awarding defendants judgment against Marina Management Services, Inc.

Date: August 11, 1997 Respectfully submitted,

By: /s/ Thomas J. Whalen

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AFFIDAVIT OF THOMAS J. WHALEN, ESQ.

I, Thomas J. Whalen, do hereby declare and depose under penalty of perjury the following:

1. I am a partner of Condon & Forsyth and have practiced law in New York and the District of Columbia for thirty years. As the person who took on this case initially, I accept responsibility, personally and professionally, for the manner in which it has been conducted, and wish to address the Court's views on my conduct, the conduct of my colleagues at the firm and how I see our conduct as conforming with the professional standards and obligations as members of the Bar.

2. My firm has litigated for years before the U.S. District Court, representing principally airlines in accidents, regulatory matters, products liability and insurance litigation.

3. We have represented KLM before Judge Sullivan, Korean Air Lines in the KAL007 shootdown before Judge Robinson, AeroMexico before Judge Hogan and Air America before Judge Pratt. We have not handled maritime matters in recent years. Nevertheless, when Mr. Singleton came to my office I was shocked that a marina licensed by the U.S. Government had seized his boat and charged, after the fact, transient fees and other add-ons which seemed to me, then and now, unjust and unfair. So driven by my conception of my duties and obligations as a member of the Bar to take a case such as this when injustice would otherwise result, I agreed to take on the defense of this matter.

4. From the beginning, and as I learned about the penalties involved, I came to the conclusion that Mr. Singleton should pay what he owed (but not what he did not owe) in order to get his boat back and find another marina at which to dock his boat because, rightly or wrongly, the people at James Creek Marina

intensely disliked him and, from what I could ascertain, passed their views on Mr. Singleton on to other marinas.

5. Mr. Singleton agreed that he should pay what he owed.

6. The Court has stressed, correctly, that John Singleton owes fees for dockage. What Mr. Singleton does not owe, however, is transient fees, as the court correctly has ruled. It should also be noted that it was not John Singleton or his counsel who sought sanctions, though counsel seriously considered filing a Rule 11 motion. The Court, on its own, raised the issue of sanctions against the plaintiff. Pursuant to appropriate procedure, we supported the Court's Show Cause Order.

7. From the beginning, and now, I believe the case should be settled on the basis of what Mr. Singleton owes to the appropriate entity entitled to the fees under the contract, no more and no less. If the plaintiff can not establish it is the rightful owner, then I would accept an indemnity in the event another entity comes forward, which I believe is a reasonable request.

8. Looking at the legal issue of entitlement, I personally examined the bankruptcy proceeding to determine the rights of the plaintiff to claim under the contract with John Singleton. The party with whom Mr. Singleton had his contract is Washington D.C. Associates, a party who is not before the Court. We reviewed the documents in the bankruptcy proceeding of Washington D.C. Associates which was provided to us by the National Park Service and conferred with counsel involved in the bankruptcy. Our investigation did not indicate that the plaintiff was ever assigned the rights under the contract with John Singleton to obtain the dockage fees at issue.

9. According to Mr. Singleton's affidavit submitted herewith, on October 19, 1996 plaintiff's collection agent

invoiced defendant for $3,987.17. On or about December 17, 1996, Mr. Singleton went to the Marina to pay the dockage fees. The money was refused. An offer of payment was again made on January 29, 1997, payment again was refused. Further payment offers were made on February 15, and 24, 1997 which were also refused. Instead, suit was brought on both outstanding dockage fees and transient fees.

10. Prior to requesting a bond hearing we attempted to negotiate a settlement of this dispute. However, the parties were unable to agree on the terms of the settlement as plaintiff insisted that John Singleton not return to James Creek Marina ever, and we were unable to establish to our satisfaction which entities held or might hold a claim to the fees which the plaintiff, who lacked capacity to sue, was seeking.

11. Defendant had deposited in our firm's escrow account two checks totalling $10,000. One check was in the amount of $7,000; the other was in the amount of $3,000. At the bond hearing on May 22, 1997 I advised the Court that at least $7,000 was in our firm's escrow account. At the time I had not confirmed that the second check for $3,000 had cleared (which it had in fact), and I could not represent to the Court that the $10,000 was in fact held in the firm's client escrow account.

12. We requested the Court hold a bond hearing after plaintiff's counsel refused to stipulate to a bond which did not include some measure of transient rates. Following the bond hearing and the hearing with the magistrate we presented an offer to settle at $5,500. This settlement offer was on or about May 22, 1997.

13. On the issue of the counterclaim, I am aware of, and follow to the letter and spirit, my ethical obligations to ensure there is a factual and legal basis for any claim based upon the information obtained from my client as well as David Rifkind's observation of the condition of the boat when it was released.

I filed the counterclaim on those points upon which I was satisfied there was a factual basis. Accordingly, I will not withdraw the counterclaims on the basis that they were frivolous and unwarranted. In my judgment they were not. My client is, however, prepared to withdraw the counterclaims as part of an overall settlement to resolve this case in the interest of my client and to end the litigation and the use of the Court's time and resources.

14. We will settle for $7,708.17 which is calculated as follows:

1. The claimed slip fees as calculated by the Court in the amount of $6,728.17 (which includes fees through July 7, 1997). July 7, 1997 Memorandum Opinion and Order, p. 4 n.4.

2. The Court filing fee in the amount of $150. February 12, 1998 Letter from Lisa Ellis, Esq. To Evelyn Sahr, Esq.

3. The actual Marshall's fees in the amount of $390. *Id.*

4. Prejudgment interest at roughly 6% from March 7, 1997, the date the action was filed, in the amount of $440.00 which is plaintiff's claim for relief. *Id.*

My client will ask the Court to release to plaintiffs the cash bond which is deposited with the Court in the amount of $7,535.55 and the balance will be paid immediately. I will also consent to the discharge of the Court's order to show cause for sanctions against Plaintiff.

My client will also require a full release from the plaintiff, a hold harmless clause and an agreement that plaintiff will seek recovery for defendant's lost or damaged property under plaintiff's insurance policy filed in connection with the seizure and will deliver to defendant any proceeds therefrom.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 23rd day of February, 1998.

/s/ Thomas J. Whalen
Thomas J. Whalen